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Issue Date: 27 October 2005

Case No. 2005 LHC 01064

OWCP No. 6-193695

In the Matter of

DAVID M. INMAN,
Claimant

v.

PALMETTO BRIDGE CONSTRUCTORS, INC.,
Employer

ST. PAUL FIRE & MARINE INSURANCE CO.
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:
Kirk E. Karamanian, Esq., for Claimant
Sean D. Houseal, Esq., for Employer

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for permanent total disability from an injury alleged to have been suffered by Claimant, Donald M. Inman, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*. (Hereinafter referred to as the "Act"). Claimant alleges that he suffered an injury to his lower back while in the course and scope of his employment with Employer on May 16, 2002. Claimant also alleges that he subsequently sustained an aggravation-type work related injury on May 24, 2002.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held on June 28, 2005, in Charleston, South Carolina. (TR at 1).[1] Claimant submitted thirty-five exhibits, identified as CX 1- CX 35, which were admitted without objection (TR. at 20, 42, 144). Employer submitted forty-one exhibits, EX 1 through EX 41. (TR. at 23, 147). Exhibits numbered 35 and 39 were withdrawn at the hearing. (TR. at 21). The remaining exhibits were admitted without objection. (TR. at 23, 147). The record was held open until September 2, 2005, for the submission of briefs. Claimant submitted his brief on September 1, 2005, and Employer submitted its brief on September 12, 2005.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The following issues are disputed by the parties:

1. Whether this claim is covered under the Act;

2. Whether a timely notice of injury was given by the employee to the employer;

3. Whether the claim is time barred;

4. Whether the alleged injury/accident arose in the course and scope of employment;

5. The nature and extent of the Claimant's disability;

6. Whether Claimant is entitled to a §14(e) penalty;

7. Whether Employer is entitled to §8(f) relief.

STIPULATIONS

At the hearing, Claimant and Employer stipulated that:

1. An employer/employee relationship existed at all relevant times;

2. Claimant's average weekly wage at the time of his injury was $968.92, resulting in a compensation rate of $645.88;

[1] EX - Employer's exhibit; CX- Claimant's exhibit; and TR – Transcript.

3. Employer filed a form LS-207 on May 27, 2004;

4. Claimant has been receiving South Carolina worker's compensation payments at the rate of $549.42.

DISCUSSION OF LAW AND FACTS

Testimony of Claimant

Claimant testified that he completed the 10th grade of high school. (TR. at 31). Claimant noted that the majority of his work experience prior to his injury had been in construction. (TR. at 32).

Claimant testified that he began working for Employer in October of 2001. (TR. at 35). The project to which Claimant was assigned was building a bridge over the Cooper River. (TR. at 38). Claimant testified that when he began working for Employer, he was in "good health." (TR at 43). Claimant noted specifically that he had not suffered from any prior back problems. (TR. at 43).

Claimant testified that he was injured at work on May 16, 2002. (TR. at 45). Claimant explained in detail:

> We had just went over there to lay the tripping bars down. That's what the rebar cages was on. And some fellows had brought them some shackles and put on that barge. Our crane barge was tied up, buddied up beside it, so I had to get those shackles off of the tripping barge and get onto my barge.
>
> But at the time, the crane operator was making a lift. I didn't want to take them big shackles and throw them down on the deck and scare him while he was on a lift. If I'd startled him, he might've done something, you know, I mean, and then again, he might not've.
>
> So I picked them up – tried to pick one up. I couldn't hardly balance my weight. So I picked one up in each hand. And I sort of jumped down to the barge. And when I jumped down to the barge, I realized I'd messed up then.

(TR. at 45). Claimant estimated that the shackle he was handling weighed 70 to 85 pounds. (Tr. at 46). Claimant clarified that he had one shackle in each hand. (TR. at 46). Claimant explained that he had to step approximately a foot and a half down from one barge to the other while balancing these shackles. (TR. at 46).

Claimant testified that he felt a "crunch" in his back when he stepped on to the lower barge, and explained that he thought he had "pulled a muscle." (TR. at 46). Claimant noted that, although he was injured in the late morning, he completed the rest of his work day. (TR. at 47).

Claimant testified that he did not immediately report his injury to his supervisor, because he thought he had just pulled a muscle. (TR. at 47). Claimant explained, "I've had pulled muscles before and you just work them out in a couple of days and keep going." (TR. at 47). Claimant noted that he was aware of Employer's policy mandating the report of injuries to the supervisor. (TR. at 48).

Claimant acknowledged on cross that he filled out a foreman's daily labor report, as is required daily by his employment duties. (TR. at 82). Though the back page of the report required Claimant to list all the day's incidents and accidents, he acknowledged that he neglected to list his own injury on May 16, 2002. (TR. at 84).

Claimant testified that he told "a couple of people" of his injury on May 16, 2002. Claimant recalled informing his wife, Jimmy Nelson and Allen Casey. (TR. at 49). Claimant testified that he felt "terrible" in the evening following the incident. (TR. at 50). Nonetheless, Claimant returned to work the following day. (TR. at 50).

Claimant testified that he worked a half day on May 20, 2002, and left early to attend a doctor's appointment. (TR. at 51). Claimant testified he consulted Dr. Dora Anguelova, his family doctor. (TR. at 51). Claimant complained of back pain, and told Dr. Anguelova that he was "possibly" hurt at work or at home. (TR. at 52, 93). Claimant acknowledged on cross that he had informed Dr. Anguelova that he had suffered symptoms for six year prior. (TR. at 94). However, Claimant explained:

> I might've said something to her like that, I don't know. But it was all just trying to cover myself on my job. That's all it was. I haven't ever had any problems or even been to the doctor in years and years.
>
> [. . .]
>
> I told her about trying to cover my job in case they got to looking at it, you know. I mean, I'm not trying to hide it now. I mean, I'm being open with it now. I mean, it was just something I done to try to hang onto my job. At the time, I cared about the job.

(TR. at 95). Claimant conceded that prior to reporting his injury to Employer, he never informed Dr. Anguelova that he actually was certain that he hurt himself at work. (TR. at 97).

Claimant recalled that Dr. Anguelova opined that he was suffering from either a pulled muscle or arthritis, and she gave him a light duty slip to return to work with for a week. (TR. at 53). Claimant testified that he gave this slip to Curly (a.k.a. Lewis Collier, Claimant's supervisor.) (TR. at 53). Claimant noted on cross that he merely told Curly that his back hurt, but gave no indication that it was possibly work related. (TR. at 75). Claimant testified to his recollection of Curly's response:

> He told me there wasn't no problem that day, only thing he needed me to do was we had a heavy lift to make, for me to tell the fellows what to do. And he took that light duty slip and he either put it on the sun visor or throwed it down in the seat. And that was all I seen of it.

(TR. at 54). Claimant testified on cross that Dr. Anguelova never tested his physical capacity, but still completed a physical capacities evaluation upon the request of Claimant's attorney. (TR. at 80).

Claimant testified that he endured a second work-related incident that aggravated his lower back injury on May 24, 2002. (TR. at 85). Claimant explained, "I aggravated my back when I jumped back down off the crane tracks onto the barge. I went to my knees when my feet hit, I just jarred my back and intensified everything that was done messed up." (TR. at 85). Claimant testified that a boat was radioed to pick him up. Claimant, however, neglected to include this incident in his daily labor report for that date as well. (TR. at 86).

Claimant testified that his back condition continued to worsen over time, prompting him to subsequently consult Dr. Anguelova again. (TR. at 55). Claimant underwent an MRI, and was referred to Dr. Poletti, an orthopedic specialist. (TR. at 55). Claimant testified that prior to his appointment with Dr. Poletti, he continued to work in his regular employment, though his back continued to pain him. (TR. at 56). Claimant testified that Dr. Poletti recommended back surgery, and took Claimant out of work completely. (TR. at 57).

Claimant testified that immediately after he was taken out of work by Dr. Poletti, he met with Curly to explain the situation. Claimant noted that he informed Curly, Leland Anderson, and Tony Bossie that his pain was related to his work incident on May 16, 2002. (TR. at 58).

Claimant testified that his last day of employment under Employer was in July of 2002. (TR. at 59). Since this time, Claimant has undergone three back surgeries, and attempted physical therapy. (TR. at 65). Claimant noted that he still continues to suffer from back pain on a daily basis, explaining:

> Anything can aggravate it. It's just like you just continuously think well, don't do this or don't do that, or you're going to hurt your back. Like I said, I just pulled something in my back or twisted it and I was laid up for that.

(TR. at 65).

Claimant testified to his current pain medication usage:

> For the pain, they got me on 40 milligram Oxycontins. I take two of them a day, one in the morning, one in the evening. Also for pain medicine, they got me on Roxycontin, that's a 15 milligram tablet and I take five of them a day.

> Since this incident, my blood pressure – I never had blood pressure problems. Now I got blood pressure problems. It stays kind of high. I take three pills for blood pressure a day.
>
> I'm on anti-depressants. I've been very depressed over the situation, and they got me on anti-depressants.

(TR. at 68).

Claimant testified that he is not able to do some of the things he had previously enjoyed because of his injury. However, he has been able to go fishing and hunting since his injury. (TR. at 102, 103).

Claimant testified that he is still able to drive, but can only stand one hour in the car before having to get out and walk around. (TR. at 69). Claimant noted that he often travels to Charleston for doctors appointments, but testified that he is "no good" after the one day trip. (TR. at 69). Claimant testified that he did not feel capable of commuting 1.5 hours each way for a job in Charleston. (TR. at 69).

Testimony of Allen R. Casey

Mr. Casey was formerly employed by Employer as a check stub pile driver on the barges. (TR. at 114). Mr. Casey described his duties as:

> I took care of everything on the water, tugboats, where the barges had to go, where they had to be set up, alongside [Claimant].

(TR. at 114).

Mr. Casey noted that he has known Claimant for fifteen years, and they had previously worked together. (TR. at 115). Mr. Casey testified that he was not aware of Claimant suffering from any back problems prior to May 16, 2002. (TR. at 115).

Mr. Casey testified that he and Claimant carpooled while they were both employed by Employer. (TR. at 115). Mr. Casey recalled that Claimant had informed him that he had an incident at work from which he suffered back pain:

> Told me he'd hurt his back toting shackles on the barge. And we just talked about it for a few minutes, said well maybe it's just a pulled muscle or something, work it out.

(TR. at 116). Mr. Casey acknowledged that it is not typical for employees to report back pain to their supervisors:

> Not on any construction site. I've worked dredge boats twelve years, built bridges, built steel mills. You work it out if you can. Save your job.

(TR. at 117). Mr. Casey agreed that "[i]f someone were to go and report to a safety person or a supervisor every time they had discomfort in their back, [it] would [. . .] reflect poorly on their job security[.]" (TR. at 117).

Testimony of Billie Jo Inman

Mrs. Inman is Claimant's wife. (TR. at 126). Mrs. Inman testified that prior to May 16, 2002, Claimant was in "excellent health." (TR. at 126). Mrs. Inman was asked if Claimant had suffered any previous back problems:

> He's had pulled muscles and things, riding motorcycles and things like that, you know, with the kids, but nothing major.

(TR. at 126). Mrs. Inman further noted that Claimant had never been taken out of work because of his back. (TR. at 126).

Mrs. Inman testified that Claimant informed her of a work related incident in which he hurt his back on May 15, 2002:

> He said that – he told me about the shackles and him toting shackles and him jumping down into the barge. And he told me that. When he come home, he was walking kind of funny and of course, I was concerned. And he said that it wasn't no big deal, that he had pulled a muscle, he thought. And that was just what we continued thinking that it was.

(TR. at 127-8). Mrs. Inman noted that Claimant continued working following this incident. (TR. at 128).

Mrs. Inman testified on cross that she was in the examination room with Claimant during his initial visit with Dr. Anguelova. When asked whether Claimant informed the doctor whether he hurt his back at home or at work, Mrs. Inman responded:

> He told her he wasn't – he didn't tell her either one. He told her that he wasn't sure where he hurt his back.

(TR. at 134). However, Mrs. Inman reiterated that Claimant informed her that he was injured at work:

> Well, I know he had to have hurt it at work. There was no other way, no other place he could have hurt it. He was at work constantly.

(TR. at 134). Mrs. Inman also testified that she believed Claimant was fearful about losing his job if he was injured at the time of his initial consultation with Dr. Anguelova. (TR. at 134).

Mrs. Inman testified that she also accompanied Claimant during his first visit with Dr. Poletti. Mrs. Inman recalled that Dr. Poletti opined that Claimant would likely have to undergo surgery. (TR. at 128). Mrs. Inman noted that this was the first time she thought that Claimant's injuries were going to prevent him from working. (TR. at 128).

Mrs. Inman described Claimant's condition following his first surgery:

> Just, he was a mental wreck. He couldn't – he was always used to working. And he couldn't get out there and do anything anymore.

(TR. at 129). Mrs. Inman recalled that Claimant's condition remained the same following his second surgery. (TR. at 129). Mrs. Inman also testified to Claimant's condition following his fusion surgery in January of 2004:

> For the first six months, he was kind of still emotional and he still had a lot of pain. He, I think with the medicine and knowing what he can and cannot do now, he's pretty much got it leveled off where he can deal with it now.

(TR. at 129).

Mrs. Inman was asked to describe a typical day for Claimant:

> He wakes up in the morning, it's not very early sometimes because he doesn't sleep very well. And he goes straight to his recliner and sits there. Sometimes, I mean, he'll get up and he'll walk around a little bit, you know, in between all this. And he'll lay on the couch a little bit and walk outside a little bit and go lay on our bed. It just depends on how he feels that morning.

(TR. at 129-30). Mrs. Inman agreed that Claimant's pain requires him to frequently change positions throughout the day. (TR. at 130). Mrs. Inman further noted that Claimant has become forgetful and has trouble concentrating, which she understands are side effects to his medication. (TR. at 130).

Mrs. Inman agreed on cross that Claimant is still able to fish, hunt and mow the grass on a riding mower from time to time. (TR. at 132, 135). However, Mrs. Inman noted that after Claimant is in the car for an hour each way to his doctor's appointment, he is "out of commission for at least that, and sometimes the next day." (TR. at 135).

Testimony of John Anderson

Since June 30, 2003, Mr. Anderson has been employed by Employer as a safety director for the Cooper River Bridge project. (TR. at 137). Mr. Anderson did not hold this position during Claimant's employment with Employer, and was thus not present on the dates of Claimant's alleged injuries. (TR. at 137). However, pursuant to his position, Mr. Anderson has Claimant's workmen's comp files in his care and custody, and reviewed them prior to his testimony. (TR. at 138).

Based on these records, Mr. Anderson testified that the first time Employer was notified of Claimant's alleged work-related injury was in July of 2002. (TR. at 138). Mr. Anderson explained that this testimony is based on "the accord first report of injury and the LS-202 that were in the file." (TR. at 138). Mr. Anderson acknowledged that there was not a transmittal letter in Claimant's file showing that the LS-202 was transmitted to the U.S. Department of Labor. (TR. at 142).

Mr. Anderson explained the procedure if someone is injured on the water under Employer and a radio call is made to come and pick them up:

> There are a number of individuals that monitor the water channel. And it would be a major event. There would be a lot of folks that would gather at the road take area, which is down at the existing bridges. And there would be a – it would be a big deal.

(TR. at 138). Mr. Anderson testified that this was "standard operating procedure" for Employer. (TR. at 139). Mr. Anderson further testified that he was not aware of "any records that reflect that a boat was directed to go pick up [Claimant] and bring him back because of an incident that occurred out on the water." (TR. at 139). However, on cross, Mr. Anderson acknowledged that he was not at the bridge on the date of Claimant's alleged incident, and thus had no personal knowledge of whether the standard operating procedure was being followed on this particular date. (TR. at 139).

Mr. Anderson testified that "if there's a call to come and get somebody because they're hurt, we're going to monitor that, and we're going to respond as well." (TR. at 140). However, Mr. Anderson acknowledged that this procedure is not required if someone needs a boat to pick them up because they have to leave early. (TR. at 141). Mr. Anderson explained:

> There were several different boats that were being used. There were small john boats and there were crew boats. And they tried to use them, the crew boat, the larger boat like a bus. It had a schedule that would travel around the jobs and stop at different locations on a schedule, if you will. And the john boats were more like taxicabs. They just ran out and picked up people and brought them back.

(TR. at 141). Mr. Anderson noted that only an injury would require the aforementioned procedures, not merely if one had to leave early. (TR. at 141).

Medical Records of Dr. Dora Anguelova

Claimant was first examined by Dr. Anguelova on May 20, 2002. (CX 16). Claimant informed Dr. Anguelova that he had been having back pain for about one week, but he had previously had problems in the preceding years. Claimant indicated that he possibly injured his back at work or at home. Dr. Anguelova had x-rays performed of Claimant's lumbar spine, and these revealed no fracture injuries.

On June 13, 2002, Claimant underwent a MRI scan of his lumbar spine. The MRI scan results indicated that Claimant had degenerative disc changes and a moderate central disc herniation at the L4-5 level and degenerative disc changes and a large central and left-sided disc herniation at the L5-S1 level. (CX 16).

Claimant was re-examined by Dr. Anguelova on June 28, 2002, at which time he complained of shooting pain in his left leg. Dr. Anguelova noted that Claimant had a disc herniation and referred him to an orthopedic specialist. (CX 16).

Dr. Anguelova saw Claimant again on July 3, 2002, at which time Claimant's symptoms included some incontinence. Dr. Anguelova felt that Claimant should remain out of work until he was examined by an orthopedist and noted that an appointment with an orthopedist was set for July 15, 2002.

Dr. Anguelova subsequently prepared a letter on April 16, 2003. At that time, she stated that she had last examined Claimant on January 24, 2003 and Claimant's complaints were primarily related to depression and a feeling of worthlessness. She felt these problems were getting progressively worse due to Claimant's inability to work and his financial problems. She felt to a reasonable degree of medical certainty that these complaints had been exacerbated by his May 16, 2002 work accident.

Medical Records and Deposition Testimony of Dr. Stephen Poletti

Dr. Poletti is a board certified orthopedic surgeon. (CX 35-4). Dr. Poletti testified that he initially evaluated Claimant on July 14, 2002. (CX 35-6). Dr. Poletti related Claimant's history:

> [Claimant] had complaints of back pain and pain radiating into his left leg. He stated that he was injured better than a month ago – I don't have the exact date – when he was lifting some shingles at work that weighed 70 to 80 pounds while working, I say in a crane capacity for the Cooper River bridge site.

(CX 35-6). Claimant informed Dr. Poletti that he was injured on May 16, 2002. (CX 35-8). Claimant indicated that he continued to work as a crane operator following his injury, despite his persistent pain in his left leg.

Dr. Poletti physically examined Claimant during their initial visit, and testified to his findings:

> He had a decreased reflex in his ankle called his Achilles tendon reflex on the left, he had a positive straight leg raising, and then he had numbness in the back of his leg and into the bottom or plantar aspect of his foot.

(CX 35-9). Dr. Poletti explained that this is significant for "the presence of radiculopathy or the S1 nerve root being pinched." (CX 35-9).

Dr. Poletti also reviewed Claimant's MRI, which revealed:

> It showed some wear and tear at the L4-5 level and evidence of a ruptured disk between L5 and S1, that is, the lowest disk in the lumbar spine was ruptured or herniated.

(CX 35-10). Dr. Poletti testified that this is consistent with Claimant's complaints of pain. (CX 35-10). Dr. Poletti concluded that Claimant "had a herniated disk at L5-S1." (CX 35-10, 11). When asked about the cause of Claimant's injury, Dr. Poletti stated:

> It's my opinion at this time – and this is after having been asked this question before and reviewing [Claimant's] record previously – that it's my opinion to a reasonable degree of medical certainty that his work-related injury did cause the L5-S1 disk to herniate.

(CX 35-11).

In a questionnaire Claimant completed for Dr. Poletti on July 15, 2002, Claimant described his accident stating, "lifted two shackles that weighed about 80 pounds each. Lower back started hurting severely. Waited two or three days, then seen doctor." Claimant denied having any previous neck or back problems. Claimant rated his pain as being close to "pain as bad as it could be." (EX 13).

Dr. Poletti testified that he initially recommended Claimant stay out of work and receive epidural injections for his injury. (CX 35-12). Dr. Poletti's records dated August 29, 2002 indicate that these injections have not helped Claimant. (CX 35-11).

Dr. Poletti then recommended that Claimant undergo a "laminectomy/diskectomy, that is, removal of the ruptured piece of disk at L5-S1." (CX 35-12). Claimant underwent this operation on September 12, 2002. (CX 35-13). Dr. Poletti described the procedure:

> The disk is between the two vertebrae. To get to the disk, you have to make an incision in the back and remove a portion of the bone that overlies the nerve, called the lamina. And so partial removal of the lamina is called a laminotomy or laminectomy. You identify the nerve, slide it to the side and remove the piece of ruptured disk.

(CX 35-13).

Dr. Poletti next examined Claimant on October 24, 2002, and opined that Claimant "was reasonable well post-operatively." (CX 35-14). However, on his December 5, 2002 visit, Claimant was suffering from increasing back and leg pain. Dr. Poletti explained:

> [T]he major risk of diskectomy is a re-rupture of the disk and some people are predisposed to re-rupturing disks – you just take out the portion that's ruptured – and in 5 to 10 percent of the people, they – you can have a re-rupture of the disk,

> very often acutely, that is , within the first three months. And [Claimant] in fact re-ruptured his disk and had a second operation.

On January 2, 2003, Dr. Poletti indicated that Claimant had a recurrent disc herniation per the follow-up MRI scan. On January 6, 2003, Dr. Poletti performed a "re-do left hemilaminectomy and discectomy" for Claimant's L5-S1 disc herniation. (CX 19).

Dr. Poletti described the fusion procedure:

> A fusion, you have to remove all of the lamina, not just a portion of it, so it was a complete laminectomy rather than just a portion of the – of the lamina removed called the laminotomy. As a result of removing all of that bone and joint and taking out the entire disk, you have to replace the disk with bone and usually using screws and rods to hold the vertebrae together.

(CX 35-24).

Following this January 6, 2003 surgery, Dr. Poletti's notes indicate that Claimant's left leg pain had improved. On April 2, 2003, Dr. Poletti stated, "I don't think he is going to return to any level of exertion or work. He is taking analgesics and his level of training and education would not allow him to perform non-physical exertional work in the labor force. As such, he may be a candidate for Social Security disability." (CX 19).

On May 7, 2003, Dr. Poletti drafted a letter detailing his opinion of the cause of Claimant's injury:

> With regards to [Claimant], he states that he was injured on May 16, 2002, while working on the Cooper River Bridge for the Palmetto Bridge Company. My understanding is that he lifted 70 to 80 pounds at that time and was injured. He had a free fragment disc herniation and I believe that it is most probably caused by an acute traumatic injury as opposed to being a result of the aging process. He has been disabled from working since I initially examined him.

(CX 19).

Dr. Poletti also opined on May 30, 2003:

> With regards to [Claimant], I have discussed his situation with you today. It is my understanding from our conversation that [Claimant] told his primary care physician, Dr. Anguelova, that he hurt his back either lifting at home or at work.
>
> [Claimant] told me that he injured his back lifting shingles at work as we have discussed.

> The basis of my opinion that [Claimant's] job injury is related to his lifting injury at work is in fact based on the information that [Claimant] gave to me and not on any independent review of any other medical records.

(CX 18).

> Dr. Poletti's notes dated October 14, 2004, indicate:
>
> [Claimant] returns for a follow-up. AP and lateral x-rays show the fusion mass to be consolidated.
>
> [Claimant] is SP fusion of his lumbosacral junction. He has undergone disectomy x 2 and interbody fusion. Post operatively he is improved but he still has significant impairment.
>
> I do not think [Claimant] is going to return to work. He has relative atrophy of his right leg with diminished Achilles reflex and positive straight leg raising.
>
> He has a 40% impairment to his lumbar spine secondary to multiple surgeries plus a separate10% impairment to his leg. It is my opinion this would place him in the category of being totally and permanently disabled.

(CX 17).

Dr. Poletti opined that Claimant reached maximum medical improvement on October 14, 2004. (CX 35-28).

Medical Evidence of Dr. J. Robert Alexander

At the request of Employer, Dr. Alexander performed an Independent Medical Examination upon Claimant on June 2, 2005. (EX 38). Dr. Alexander reviewed Claimant's family, social and medical history, and performed a physical exam. (EX 38). The specific medical records that Dr. Alexander reviewed were from Dr. Poletti, Dr. Zgleszewski, Dr. Steichen and The Directors Group. Following this, Dr. Alexander reached the following assessment:

> Chronic lumbar pain with radiculopathy. Postlaminectomy syndrome with history of 3 surgical interventions including interbody fusion at L5-S1.

(EX 38). Dr. Alexander's report also included the following discussion:

> 1. Based on [Claimant's] reported history, record review, and physical examination findings, in my opinion, to a reasonable degree of medical certainty, it is felt that [Claimant's] on-the-job accident of May 16, 2002, was causally related to his subsequent lumbar and radicular symptoms that resulted in multiple surgical interventions. [Claimant] was not able to provide me with much information concerning the May 24, 2002, injury and I have no reason

to attribute his current condition to the alleged on-the-job accident of this particular date.

2. Give that [Claimant's] on-the-job accident of May 16, 2002, is felt to be causally related to his lumbar and radicular symptoms, and resultant treatment including 3 surgical interventions, and impairment rating was determined utilizing the Current AMA Guidelines to Permanent Impairment, Fifth Edition. [Claimant] falls in DRE lumbar Category V and is determined to have an impairment rating of twenty-eight percent of the whole person.

3. [Claimant] may likely require additional medical treatment, including intermittent interventional blocks for pain control in the event his symptoms worsen periodically, which is plausible. He may also require periodic utilization of pain medication to control intermittent symptomatology.

4. [Claimant] is determined to be at MMI, but again he may require periodic interventional measures and utilization of pain medications for intermittent symptomatology.

5. [Claimant] was determined to have a permanent impairment rating of twenty-eight percent of the whole person secondary to continued radicular symptoms, loss of motion segments secondary to fusion, and reflex change of the left Achilles. To a reasonable degree of medical certainty, it is felt that this permanent impairment is secondary to his reported on-the-job accident of 5/16/02. To determine definitive permanent limitations, it may be appropriate to obtain a functional capacity evaluation. Since an FCE is not available, I think it would be reasonable for individual to have limitations of no prolonged sitting or standing without allowances for positional changes. [Claimant] should also likely avoid repetitive lumbar flexion, twisting and repetitive heavy lifting due to potential aggravation of symptomatology. Lifting should be limited to 25 pounds or less. Again, more definitive restrictions could be determined if deemed necessary by an FCE.

(EX 38).

Testimony and Vocational Report of Pamela Hill White

Ms. White, a vocational expert, testified that she was enlisted by Employer to perform an employability analysis and labor market survey for Claimant. (TR. at 148). Ms. White reviewed the following medical records:

- Dr. Stephen Poletti
- Dr. John Steichen
- Dr. Timothy Zgleszewski
- Georgetown Outpatient Therapy Center
- Patsy Williamson, RN, COHN-S, BSN, NBA

- Dr. Anguelova, Murrells Inlet, SC

(EX 34). Ms. White also considered both Claimants' employment records with Employer and the skills, knowledge and abilities he gained in this position. (TR. at 150). Ms. White further analyzed Claimant's educational and employment history and his physical limitations/return to work guidelines. (EX 34). Ms. White noted that Claimant "may physically be capable of working part-time or full-time at the sedentary or some light physical demand level."[2]

Ms. White conducted a labor market survey and review in Andrews, South Carolina and surrounding areas to include Myrtle Beach and Charleston areas. Ms. White noted that, "These are the work areas that [Claimant] frequently participated in work prior to his injury." (EX 34). The report concluded:

> If [Claimant] is capable of performing sedentary work, he can consider jobs that utilize transferable skills and worker traits and/or positions that are entry level and/or provide on the job training. Positions that are similar in nature or utilize work skills or knowledge include: desk officer, traffic manager, classification clerk, information clerk, referral clerk, callout operator, dispatcher. Wages for these positions range from $8.00 per hour up to $15.00 per hour. Positions may also be considered that are entry level and/or provide on the job training. Sedentary positions include: cashier, counter clerk, parking lot attendant, security monitor, hand assembly, telemarketer, reservationists, sales (various industries to include telecommunications, insurance, etc.), entry clerk, inspector, entry level sales, etc. Wages range from $6.00 per hour up to $15.00 per hour, with most positions ranging from $8.00 to $10.00 per hour. Successful sales workers can earn $30,000.00 to $60,000.00 per year and up.
>
> If [Claimant] is capable of performing light work, then he can return to some of his previous positions or positions utilizing transferable skills or worker traits such as crane crew supervisor, various crane operator positions, derrick boat operator, multiple equipment operator positions, construction foreman, distribution manager, inventory clerk, truck driver, and equipment operator. Wages for these positions range from $10.00 to $21.00 per hour and up depending upon experience. If [Claimant] can return to truck driving and obtain a CDL, he can earn wages from $30,000.00 to $50,000.00 per year plus mileage and bonuses. Light entry-level positions available include: rental clerk, assistant

[2] Ms. White's report notes that, as a guideline, *The Dictionary of Occupational Titles, Revised Fourth Edition* describes sedentary and light work as follows:
Sedentary Work – Everything up to 10 pounds of force occasionally (1/3rd to 2/3rd of time) to lift, carry, push or otherwise move objects. Involves sitting most of the time, but may involve walking or standing for brief periods of time.
Light Work – Exerting up to 20 pounds of force occasionally, and/or 10 pounds of force frequently, and/or a negligible amount of force constantly (2/3rd or more of time) to move objects. Jobs are also considered light work when it requires walking or standing to a significant degree, sitting most of the time but entails pushing and/or pulling of arm or leg controls, and working at a production rate pace entailing constant pushing and/or pulling of materials even though the weight of materials is negligible.
(EX 34).

manager/manager trainee (various industries), security/gate guard, safety and quality assurance trainee, assistant security manager, some machine operator positions, additional sales positions, inspector. Entry-level or trainee positions involve median wages from $6.00 per hour to $12.00 per hour and up to start. Outside sales positions can earn from $30,000.00 to $60,000.00 per year. Note, positions may or may not include benefits and may be part-time or full-time. Some positions may include commission bonus or shift differentials.

(EX 34). Ms. White's labor market survey listed the following specific positions as available. Ms. White also testified that the following positions were approved by Dr. Alexander as appropriate for Claimant:

Job Title: Sales Associate
Results: Multiple positions available throughout the Charleston and-Myrtle Beach areas at the sedentary and light level.
Requirements: Positions involve sales through incoming or outgoing telephone and/or meeting directly with customers, selling a variety of services including vacation rentals, cellular phone systems, vacation packages, etc.
Wage: Ranges from $5.15 per hour up to $9.00 per hour and up. May or may not include benefits. May or may not include bonus or commission.

Job Title: Assembler/Hand Assembler
Employer: Positions available through the SC Employment Security Commission and various companies in Myrtle Beach, Georgetown and Charleston.
Results: Positions involve hand assembly and may be available at the sedentary and light level. High school diploma or GED helpful but not necessary with experience.
Wage: Ranges from $7.50 to $10.00 per hour.

Job Title: Quality Inspector and Parts
Employer: Positions available in Charleston, Goose Creek areas with various employers.
Results: Hire periodically.
Requirements: High school diploma or GED preferred but not necessary. SC driver's license required. Experience in production or quality inspection helpful but willing to train qualified applicants. Must be able to complete paperwork correctly.
Wage: $10.00 per hour.
Notes: May be required to work flexible shifts.

Job Title: Equipment Operator
Employer: Various employers throughout Charleston, Myrtle Beach, Georgetown.
Results: Light duty positions involve crane operation, bulldozer, paver, roller, forklift operator, etc. Positions available on a frequent to constant basis.
Requirements: High school diploma or GED not required with experience.

Require frequent pushing/pulling of hand controls and possible foot controls.
Wage: Ranges from $8.00 up to $20.00 an hour.

Job Title: Truck Driver
Employer: Various employers throughout Charleston, Myrtle Beach.
Results: Positions available on a frequent to constant basis.
Requirements: Must be able to obtain a CDL and have a clean driving record. Some retraining may be necessary. Positions exist that do not require lifting or loading of freight. Must be able to sit for extended periods and push/pull hand and foot controls.
Wage: Ranges from $30,000.00 to $50,000.00 per year.

Job Title: Dispatcher
Employer: Multiple jobs listed with the SC Employment Security Agency in Myrtle Beach, Charleston, Macedonia and Huger, South Carolina
Results: Positions open on a frequent to constant basis.
Requirements: Positions are sedentary in nature. A basic knowledge of computers is helpful but many agencies will train. Knowledge of truck dispatching, etc helpful. Will take calls and forward to trucks, taxis, etc. Communications skills a plus.
Wage: $8.25 per hour up to $10.50. One position offered up to $15.00 per hour.

Job Title: Material Movers/Forklift Operators
Employer: Multiple positions listed with the SC Employment Security Commission in Charleston and Myrtle Beach, South Carolina.
Requirements: Positions exist that are light in nature with all lifting performed by the machinery.
Wage: Ranges from $9.00 to $10.00 per hour.

Job Title: Grading Operator/Foreman
Employer: Position available through the SC Employment Security Commission in Myrtle Beach, SC.
Results: Position currently available.
Requirements: Demonstrated ability in the operation of heavy equipment and management of personnel and the performance of site work construction with the ability to read and interpret plans. SC driver's license required and current 3-year Motor Vehicle record.
Wage: Not provided.

Job Title: Sales Associate
Employer: Multiple positions in the SC Employment Security Commission in Myrtle Beach and Charleston, South Carolina.
Results: Positions exist that are sedentary and light in nature. Telephone sales also exist. Positions available on a frequent to constant basis.
Requirements: Receiving inbound or performing outbound sales calls.

Wage: Dependent upon experience, up to $40,000.00-$80,000.00 per year with commission.

Job Title: Management Trainee
Employer: Various positions available with SC Employment Security Commission in Charleston and Myrtle Beach areas.
Results: Positions available on a frequent to constant basis.
Requirements: High school diploma or GED preferred but not required. No work experience needed, will train. Train to be manager in various industries, including retail and insurance service center. Full time positions.
Wage: Varies.
Notes: Commission may be provided.

Job Title: Counter Person/Cashier
Employer: Multiple positions frequently available in Myrtle Beach and Charleston retail, parts and convenience stores.
Results: Positions currently available.
Requirements: Varies. No experience needed, will train.
Duties: Cash handling. Answer phones. Some positions require standing and stocking, but packages can be broken down into lighter units. Others are sedentary.
Wage: Mm. wage up to $8.00 per hour to start.

Job Title: Customer Service
Employer: Various companies
Results: Positions frequently available
Requirements: Good written/verbal skills. Must be US Citizen. Desk job. No stairs.
Duties: Handle customer service, change orders, provide customer service, etc.
Wage: $8.25/hr + performance based incentives.

Job Title: Parts Counter Person
Employer: Multiple companies
Results: Hire periodically
Requirements: Light duty positions
Duties: Familiar w/auto parts, strong customer skills. Cash handling. May have to sweep, mop & clean bathrooms.
Wage: $6.50— 15.00 w/experience.
Notes: They have to meet quotas.

Job Title: Inside Phone Salesperson
Charleston and Myrtle Beach SC
Results: Frequently available
Requirements: "Need strong people skills", sitting position.
Duties: Mostly telemarketing position. Some paperwork provided — will train.
Wage: $9.00/hr + commission.

Job Title: Front Desk
Employer: Positions throughout Charleston and Myrtle Beach
Requirements: Strong people skills, computer knowledge helpful.
Duties: Customer service, answer phones, check-in/out guests, cash handling.
Wage: Above minimum
Note: Shift work

Job Title: Phone Operator
Employer: Mt. Pleasant, SC
Results: Recently hired
Requirements: Sitting 95% of the time. They'll train on their computer system. Must have good communication skills.
Duties: Answer phones, multi-task. Computer knowledge helpful.
Wage: $7.50/Hr.
Note: 10 am 6 pm Tues - Sat. They keep applications for 3 months.

Job Title: PBX Operator
Employer: Charleston, SC
Results: Taking applications
Requirements: Lift up to 30 lbs. loading paper into copier (can be broken down in smaller amt.). Good communication skills and good diction. Basic key punching; "they'll train you while you work".
Duties: Answer phones, multi-task, assist front desk, make copies and general customer service.
Wage: $7.50 - 8.50/hr.
Note: Shift work, some weekends

Job Title: Customer Service Representative
Employer: Mount Holly, SC
Results: Taking applications
Requirements: Good communication and strong people skills. Some computer knowledge. This is mostly a sitting position.
Duties: Heavy customer service - placing and taking orders.
Wage: Depends on experience

Job Title: Ticket Taker
Employer: Hiring frequently for various movie theaters, events, and tourist attractions throughout Charleston and Myrtle Beach.
Results: Multiple positions available
Requirements: Strong people skills and friendly. Standing most of the time.
Duties: Take tickets, answer general questions, etc.
Wage: $6.50/hr.
Note: Shift work. Ticket taker is an entry level position. You can move up to box office and other positions.

Job Title: Central Station Operators
Employer: Charleston, SC
Results: Hire periodically
Requirements: Basic computers, cool head in crisis.
Duties: Answer phones, monitor alarms.
Wage: $9.00/hr.
Note: Position can be very stressful.

Job Title: Loss Prevention Agent
Employer: Multiple retail establishments in Charleston and Myrtle Beach
Results: Positions available
Requirements: No experience necessary. Positions exist wherein cameras are monitored and other staff apprehend suspects.
Duties: Monitor cameras, registers, and gen. cash handling. May have to walk around store.
Wage: $8.00 to $10.00/Hr. starting

Job Title: Loss Prevention Camera Operator
Employer: Charleston, SC
"Darcy" 556-0080
Results: As of Oct. 2004 - position available
Duties: Monitor cameras/ sedentary
Wage: $9-$l2/Hr.
Notes: Sitting position. They will train.

Job Title: Telemarketing
Employer: Charleston and Myrtle Beach, SC
Results: Positions available
Duties: Telemarketing, phone calls.
Wage: $8/Hr. plus commission
Notes: Sitting position; OTJ training

Job Title: Appointment Setters
Employer: Charleston and Myrtle Beach
Results: Multiple positions available in tourist industry.
Requirements: Positions are sedentary, with no lifting and no overhead work. No experience needed, will train.

Job Title: Concession Server
Employer Name: Charleston SC
Contact Person: Heather McFadden
Result: Light duty position available
Tasks Performed: Cash handling, server. Makes popcorn, drinks. Takes money and makes change operating cash register.
Requirements: Standing most of shift. No lifting over 3-5# required. Willing to train.

Wages: $6.50 per hour.

Job Title: Security Officer
Employer: Charleston, SC
Results: Taking applications.
Requirements: Educational requirements - none. No previous experience required. Physical demands, according to Mr. Threatt, include sitting and walking. The heaviest thing that would have to be lifted at any time would be a fire extinguisher that weighs 10-15 pounds. This is on a very infrequent basis (less than once every 6 months).
Duties: Unarmed security for different businesses. Positions available which require monitoring of closed circuit TV, and positions available to provide car patrolling. These are separate positions.
Wage: $7.50 - $8.50 per hr. and may or may not include benefits.

Job Title: Security Guard
Employer: Multiple companies in Charleston and Myrtle Beach
Requirements: Position requires no lifting or carrying on a regular basis. GED and law enforcement or security experience helpful.
Duties: Provide security for different sites. Provide access control. Monitor sites and call for police assistance if needed. Unarmed positions available.
Wage: $8/Hr.

Job Title: PBC Operator
Employer: Isle of Palms, SC
Results: Taking applications
Requirements: Good communications skills and must be able to multitask.
Duties: Answer all external and internal calls in a friendly, courteous and timely manner. Responsible for inputting messages and wakeup calls into the system, retrieving messages and information for guests and other Wild Dunes employees, as well as, being a liaison to all emergency services. Will train.
Wage: $8 - $8.25/Hr.
Notes: Varied shifts including weekends.

Job Title: Visual Quality Inspector
Employer: Multiple positions identified with Hammes Staffing, Galiman Personnel.
Results: Position available in North Charleston.
Requirements: No previous experience is required. Less than a high school diploma is accepted.
Duties: Responsibilities involve inspecting small parts such as automotive parts under microscope to detect defections. Will sit at workstations to perform inspecting duties. Sedentary work, demands strength.
Wage: $6.50/Hr.
Notes: Positions available on a part-time and full-time basis.

Job Title: Parking Lot Attendant/Cashier
Employer: Charleston Aviation, Charleston Airport
Requirements: Less than a high school diploma is accepted if able to handle money HS/GED is preferred.
Duties: Involved handling money, making change and dealing with customers exiting parking area. Duties involve sitting in booth and collecting parking fees. Position allows the opportunity to stand as tolerated for the majority of shift. Occasionally to rarely, will be requested to walk out of booth to identify specific license plates. Sedentary work demands involved.
Wage: $19,823.00 annually
Notes: Full-time positions 40 hrs. per week. If working night shift, will rotate duties to inventory lot every 25 days (walk up to 15 mm. per shift at this time/not daily).

Job Title: Parking Attendant
Employer: Multiple companies, Charleston, SC
Requirements: No previous experience required. Less than a high school diploma is accepted.
Duties: Duties involve attending parking lots, taking cash and making change.
Wage: $5.50 to 6.50/Hr.

Job Title: Electronic Assembler (Wire Harness)
Employer: Positions identified with Hammes Staffing.
Requirements: Persons with very good manual/finger dexterity highly recommended. Previous electronic assembly experience is helpful, however, positions are available requiring no previous experience.
Duties: Duties involve looping wire between guide pegs on harness board following color-coded lines or sequential numbers on board or diagram and ties or wraps wires together at designated points to form a harness. Light strength work demands.
Wage: $7 - $9/Hr. Varies based on relevant experience.
Notes: Full-time positions.

Job Title: Cashier/Parking Attendant (Booth)
Employer: Positions available periodically through Central Parking and the SC Employment Security Commission Job Service Office.
Results: Positions currently available.
Requirements: Work is sedentary. Stool is provided. High School or GED preferred but not required. On-the-job training provided. Will train. Calculations performed by a computer. Extensive math skills not required. No significant lifting required.
Duties: Collecting money from customers using parking garage. No patrol required or necessary for position. Will swipe card to obtain price. Make change.
Wage: $6.00 - $6.25/Hr.

Job Title: Gate Guard
Employer: Positions available from time to time at Middleton Place, Charleston, SC County Parks & Recreation and other locations in the area.
Requirements: HS helpful but not required.
Duties: Issuing passes at front gate, directing guests. May sit/stand as needed.
Wage: $5.15 - $8.50/Hr.
Notes: Positions are typically part-time 20 - 30 hrs. per week.

Job Title: Courtesy Clerk
Employer Name: Charleston SC
Tasks Performed: Review individual's membership card before allowing admission to the store and/or review sales receipt and count items to determine if the sales receipt matches the client's purchase leaving the store. Position involves standing most of the time but may use a stool if needed. Positions do not require any lifting or reaching overhead. Involves greeting customers with appropriate customer service skills.
Requirements: No heavy lifting and no overhead lifting required.
Ed. Requirements: High school diploma or GED preferred. Will train.
Wages: $7.50 to $8.50 per hour

Job Title: Inspector/Assembler
Employer: Positions identified through the SC Employment Security Commission Job Service Office.
Requirements: High school diploma or GED required. Previous experience in set-up and assembly preferred.
Duties: Will sit at workstations to inspect and assemble small products. Full-time positions with some Saturday overtime hours available.
Wage: $8-$9 per hour.

Job Title: Parking Enforcement Workers
Employer: Positions identified through the SC Employment Security Commission Job Service Office. Positions located in Charleston.
Requirements: High school diploma/GED required. Any experience in dealing with the public is helpful.
Duties: Duties involve operating a 3 wheel motorized Cushman safely through downtown Charleston to enforce the ordinance regulating orderly parking of motor vehicles within the city. Light work demands involve driving motorized vehicle and some standing and walking to place citations on vehicles violating parking regulations.
Wage: $15,128.05 annually

Job Title: Delivery Driver
Employer: Charleston, SC
Requirements: No previous experience required. No specific educational requirements indicated.
Duties: Will be responsible for driving own vehicle to deliver food orders to

customers within a 5-mile radius of restaurant. Part-time and full-time positions available. Light strength work demands involved.
Wage: $7.00 per hour plus tips.

Job Title: Taxi Cab Driver
Employer: Position identified in Charleston Tri-County area.
Duties: Will operate taxi throughout Charleston Tri-County area to transport passengers as requested. Will receive passenger pickup instructions from dispatcher and transport accordingly. Drivers lease vehicle from company. Sedentary to light strength work demands involved due to driving. Occasionally may pick up a package for delivery from hospital that might weigh up to 50 pounds. May assist passengers with bags from pick-ups at airport. Not required to lift heavy bags but might assist. Fulltime positions are available. Paid based on fares and tips.
Wage: Average earnings are $400 per week for new drivers until become familiar with operation over several months then potential to earn $500+ weekly.

(EX 34).

Ms. White also completed an addendum to her labor market survey, which included positions for Claimant's consideration at the sedentary to light physical demand categories. Ms. White noted that it is a sampling "of positions that are currently available, have been available in the recent past and/or are periodically available and accepting applications." (Addendum to EX 34). Dr. Alexander affirmatively approved the following as appropriate for Claimant by checking the "yes" box next to the question: "Is [Claimant] capable of performing above listed position":

Job Title: Sales Associate
Results: Multiple positions available throughout the Charleston and Myrtle Beach areas at the sedentary and light level.
Requirements: Positions involve sales through incoming or outgoing telephone and/or meeting directly with customers, selling a variety of services including vacation rentals, cellular phone systems, vacation packages, etc.
Wage: Ranges from $5.15 per hour up to $9.00 per hour and up. May or may not include benefits. May or may not include bonus or commission.

Job Title: Quality Inspector and Parts
Employer: Positions available in Charleston, Goose Creek areas with various employers
Results: Hire periodically
Requirements: High school diploma or GED preferred but not necessary. SC driver's license required. Experience in production or quality inspection helpful but willing to train qualified applicants. Must be able to complete paperwork correctly.
Wage: $10.00 per hour
Notes: May be required to work flexible shifts

Job Title: Dispatcher
Employer: Multiple jobs listed with the SC Employment Security Agency in Myrtle Beach, Charleston, Macedonia and Huger, South Carolina
Results: Positions open on a frequent to constant basis.
Requirements: Positions are sedentary in nature. A basic knowledge of computers is helpful but many agencies will train. Knowledge of truck dispatching, etc. helpful. Will take calls and forward to trucks, taxis, etc. Communication skills a plus.
Wage: $8.25 per hour up to $10.50 per hour. One position offered up to $15.00 per hour.

Job Title: Sales associate
Employer: Multiple positions in the SC Employment Security Commission in Myrtle Beach and Charleston, South Carolina
Results: Positions exist that are sedentary and light in nature. Telephone sales also exist. Positions available on a frequent to constant basis.
Requirements: Receiving inbound or performing outbound sales calls.
Wage: Dependent upon experience, up to $40,000-$80,000 per year with commission.

Job Title: Inside Phone Salesperson
Charleston and Myrtle Beach
Results: Frequently available.
Requirements: "Need strong people skills", sitting position
Duties: Mostly telemarketing position. Some paperwork provided – will train.
Wage: $9.00/hr + commission

Job Title: PBX Operator
Employer: Charleston South Carolina
Results: Taking applications
Requirements: Lift up to 30 lbs., loading paper into copier (can be broken down in smaller amt.). Good communication skills and good diction. Basic key punching; "they'll train you while you work."
Duties: Answer phones, multi-task, assist front desk, make copies and general customer service.
Wage: $7.50 - $8.50/hr.
Notes: Shift work, some weekends.

Job Title: Customer Service Representative
Employer: Mount Holly, SC
Results: Taking applications
Requirements: Good communication and strong people skills. Some computer knowledge. This is mostly a sitting position.
Duties: Heavy customer service – placing and taking orders.
Wage: Depends on experience.

Job Title: Telemarketer
Employer: Charleston and Myrtle Beach, SC
Results: Positions are available
Duties: Telemarketing, phone calls
Wage: $8/hr. plus commission
Notes: Sitting position; OTJ Training

Job Title: Appointment Setters
Employer: Charleston and Myrtle Beach
Results: Multiple positions available in the tourist industry
Requirements: Positions are sedentary, with no lifting and no overhead work. No experience needed, will train.

Job Title: Concession Server
Employer: Charleston South Carolina
Contact person: Heather McFadden
Results: Light duty position available
Tasks performed: Cash handling, server. Makes popcorn, drinks. Takes money and makes change operating cash register.
Requirements: Standing most of shift. No lifting over 3-5# required. Willing to train.
Wage: $6.50/hour.

Job Title: Visual Quality Inspector
Employer: Multiple positions identified with Hammes Staffing, Gallmen Personnel.
Results: Positions available in North Charleston
Requirements: No pervious experience required. Less than a high school diploma is accepted.
Duties: Responsibilities involve inspecting small parts such as automotive parts under microscope to detect defections. Will sit at workstations to perform inspecting duties. Sedentary strength work demands involved.
Wage: $6.50/hr.
Notes: Positions available on a part-time or full-time basis.

Job Title: Electronic Assembler (Wire Harness)
Employer: Positions identified with Hammes Staffing.
Results: Persons with very good manual/finger dexterity highly recommended. Previous electronic assembly experience is helpful, however, positions are available requiring no pervious experience.
Duties: Duties involve looping wire between guide pegs on harness board and ties or wraps wires together at designated points to form a harness. Light strength work demands.
Wage: $7-9/Hr. Varies based on relative experience.
Notes: Full time positions.

Job Title: Cashier/Parking Attendant (Booth)
Employer: Positions available periodically through Central Parking and the SC Employment Security Commission Job Service Office.
Results: Positions currently available.
Requirements: Work is sedentary. Stool is provided. High School or GED preferred but not required. On-the-job training provided. Will train. Calculations performed by a computer. Extensive math skills not required. No significant lifting required.
Duties: Collecting money from customers using parking garage. No patrol required or necessary for position. Will swipe card to obtain price. Make change.
Wage: $6.00-$6.25/hr.

Job Title: Gate Guard.
Employer: Positions available from time to time at Middleton Place, Charleston, SC County Parks & Recreation and other locations in the area.
Requirements: HS helpful, but not required.
Duties: Issuing passes at front gate, directing guests. May sit/stand as needed.
Wage: $5.15 - $8.50/Hr.
Notes: Positions are typically part-time 20 – 30 hrs. per week.

(Addendum to EX 34).

Testimony and Vocational Report of Benson Hecker

Dr. Becker is an expert in the field of vocational rehabilitation. (TR. at 223). Dr. Becker completed a report upon request of Claimant. (CX 33). Dr. Hecker reviewed the following medical records:

- East Cooper Regional Medical Center, 9/12/02 Evaluative procedures.
- East Cooper Regional Medical Center, 9/12/02 Report of surgical procedure.
- Georgetown Memorial Hospital, 12/11/02 MRI performed.
- East Cooper Regional Medical Center, 1/6/03 Report of surgical procedure
- East Cooper Regional Medical Center, 1/12/04 Report of surgical procedure
- Dr. Anguelova, 1/10/03 —3/23/05 Treatment for sinusitis, pain, anxiety, headache/visual change, cyst, stress, depression, insomnia, GERD, chest pain.

(CX 33). Dr. Becker also reviewed Claimant's Physical Capacities Capabilities report, and his education and employment history. Dr. Becker also interviewed Claimant in person in drafting this report. (CX 33).

Dr. Becker's report states in part:

> Based on [Claimant's] age, education, vocational background and transferable skills, his impairments, the limitations that those impairments impose upon him as well as the effects of his chronic moderately-severe pain, it is my opinion that

[Claimant] is unable to perform any substantial gainful work activity which exists in significant numbers in open competition with others. Rationale for this opinion is as follows:

[Claimant] sustained injuries to his back while working. Treatment has included a variety of modalities including: multiple evaluations, multiple surgical procedures, pain medication, TENS unit, anti-inflammatory agents, physical therapy, injections and other conservative measures—all with no significant improvement in functional capacities or substantial reduction of his chronic pain.

Functionally, [Claimant] is extremely limited in his capacities for sitting, standing, walking, stooping, squatting, lifting, carrying, turning/twisting his spine, pushing/pulling arm controls, reaching, bending, crawling, climbing, working at unprotected heights, being around moving machinery, driving automotive equipment and being exposed to dust, fumes and gases.

With regard to pain, [Claimant] still experiences moderately-severe pain with any positional movements which requires him to stop activities, change positions, take medications (produced side effects of drowsiness), recline for significant portions of the day and use heat modalities.

Further, it has been opined by treating physicians that [Claimant's] pain is present to such an extent as to be distracting to adequate performance of daily activities or work and that physical activities such as walking, standing, bending, stooping, moving of extremities would greatly increase [Claimant's] pain to such a degree as to cause distraction from the task or even total abandonment of the task. It has also been opined that [Claimant's] pain and/or medications would produce side effects so to limit the effectiveness of work duties or the performance of such everyday tasks as in driving an automobile because of distraction, inattentiveness or drowsiness. Finally, it has been opined that although [Claimant's] pain level may be less intense or less frequent in the future, it will still remain a significant element in this individual's life and that treatments (biofeedback, nerve stimulation, injections have had no appreciable impact or have only briefly altered the level of pain that this patient experiences.

Prior to any physical and/or any emotional impairments, it was this evaluator's opinion that [Claimant] would have been classified as a "fair" to "good" employment prospect. Rationale for this opinion is as follows:

1. [Claimant] has a limited education (10th grade) not used for vocational purposes;
2. All of [Claimant's] past relevant work has been in the Construction Industry working as a Crane Operator/Rigger;
3. All of [Claimant's] past relevant work required large muscle activities and significant strength functions;
4. None of [Claimant's] past relevant work involved clerical functions;

5. None of [Claimant's] past relevant work involved job functions in an "Industrial" work setting;
6. None of [Claimant's] past relevant work involved working with the public.
7. Although [Claimant's] performed skilled work, all of his skills would be classified as being "Industry" specific, and as such, not transferable; and
8. Any other work at "lighter" levels of physical demand would require significant adjustment in terms of tools, industries, work settings and job settings.

Any work at "lighter" levels of physical exertion would demand that [Claimant] be able to sit, stand, or walk, concentrate and maintain task investment for prolonged periods of time. Additionally, [Claimant] would be required to use his upper and/or lower extremities, rapidly, repetitively and continuously in order to operate machinery or to use tools, while meeting "production" standards and/or quotas. Further, [Claimant] would be required to maintain work station and/or attendance on a regular basis (eight hours daily, five days per week), be able to effectively deal with "normal" work related stresses associated with meeting "production" quotas, and be able to effectively get along with significant others (co-workers, supervisors and/or the general public).

When considering [Claimant's] age, education, vocational background, transferable skills, adjustment problems, impairments, limitations and the effects of his chronic pain, it is my opinion that [Claimant] is unable to effectively perform the above described "basic" work related behaviors. As a result, it is my opinion that [Claimant] is unable to perform any substantial gainful work activity which exists in significant numbers in open competition with others.

It is also this evaluator's opinion, that unless [Claimant's] condition dramatically changes, that he will remain so disabled.

ANALYSIS

Coverage

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that his injury occurred on a landward area covered by §3(a) and that his work is maritime in nature and not specifically excluded by the Act. 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT)(1 983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate that jurisdiction exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id*.

Situs

The situs requirement of the Act under §3(a) states:

> Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 3(a). "The situs test, in sum, is a geographical one, and even though a longshoreman may be performing maritime work, if he is not injured within the land area specified by the statute, he is not covered by the Act." *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 222 (4th Cir. 1998).

Employer does not appear to contest that the situs requirement of the statute has been met in the present case. Further, the evidence establishes that Claimant alleges to have been injured while working on a barge located on navigable waters.[3] Thus, I find that Claimant satisfies the situs test. However, Employer argues that the status test has not been satisfied, because Claimant was not engaged in maritime employment at the time of his accident.

Status

The status requirement, added as §2(3) of the Act by the 1972 Amendments, states that a covered employee under the Act is, with certain exclusions, "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. § 902(3). As amended in 1984, the Act expressly excludes individuals "employed exclusively to perform office clerical, secretarial, security, or data processing work." 33 U.S.C. § 902(3)(A). This amendment was intended to exclude employees whose work lacks a substantial nexus to maritime navigation and commerce or does not expose them to hazards usually associated with longshoring, shipbuilding, and harbor work. *Powell v. International Transportation. Services*, 18 BRBS 82 , 84 n. 5 (1986).

Prior to the enactment of the 1972 Amendments to the Act, in order to be covered by the Act, claimant had to establish that his injury occurred upon the navigable waters of the United States, including any dry dock. *See* 33 U.S.C. § 903(a)(1970)(amended 1972 and 1984). In 1972, Congress amended the Act to add the status requirement of §2(3) and to expand the sites covered under §3(a) landward. Following enactment of the 1972 amendments, the Supreme Court decided that the amendments replaced the single situs requirement with a two-part situs and status standard. *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979); *Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249, 264-65, 97 S.Ct. 2348, 2357-58, 53 L.Ed.2d 320 (1977). Now generally both the status requirement, as defined by section 902(3), based on the nature of the job, and the situs requirement, as defined by section 903(a), based on location, must be satisfied for the Act to apply. *Id*.

[3] See *infra* "Causation."

However, the United States Supreme Court determined that Congress, in amending the Act to expand coverage, did not intend to withdraw coverage under the Act from workers injured on navigable waters who would have been covered by the Act before 1972. *Perini*, 459 U.S. at 315-316. In *Perini*, the plaintiff was injured while employed as a construction worker aboard a barge upon the actual navigable waters of the United States. The Court held that the construction worker was covered by the Act even though his employment was not "maritime" in nature, because it was sufficient that he was injured on the navigable waters of the United States in the course of his employment. *Id*. at 324, 103 S.Ct. at 650. The Court observed that, prior to the 1972 amendments, the Act covered only workers who were injured on the navigable waters of the United States and that the amendments expanded coverage to include workers injured while ashore if the worker was engaged in "maritime employment." Thus, the plaintiff in *Perini* qualified for pre-1972 coverage under the Act. Since the Court found that the amendments were enacted to expand the coverage of the Act to shore side workers, and not to narrow its coverage, the Court ruled that the plaintiff was covered by the Act regardless of the nature of his employment because he was injured on the navigable waters of the United States. *Id*. at 323-24, 103 S.Ct. at 650-51.

The Court explained in *Perini*, after discussing the legislative history of the 1972 Amendments to the Act:

> There is nothing in these comments, or anywhere else in the legislative Reports, to suggest, as Perini claims, that Congress intended the status language to require that an employee injured upon the navigable waters in the course of his employment had to show that his employment possessed a direct (or substantial) relation to navigation or commerce in order to be covered. Congress was concerned with injuries on land, and assumed that injuries occurring on the actual navigable waters were covered, and would remain covered.

Perini, 459 U.S. at 318-319, 15 BRBS at 76 (CRT).

Thus, the Court held that when a worker is injured on actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in §2(3), and is covered under the Act, provided he is not excluded by any other provision of the Act. The Court considered "these employees to be "engaged in 'maritime employment' not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters." *Id.* at 324. Therefore, when a worker is injured on actual navigable waters while in the course of his employment on those waters, he is a maritime employee under §2(3). Regardless of the nature of the work being performed, such a claimant satisfies both the situs and status requirements and is covered under the Act, unless he is specifically excluded from coverage by another statutory provision. *Id.*, 459 U.S. at 323-324, 15 BRBS at 80-81 (CRT). *See also Crapanzano v. Rice Mohawk, U.S. Const. Co., Ltd.,* 30 BRBS 81 (1996); *Nelson v. Guy F. Atkinson Const. Co., Ltd.,* 29 BRBS 39 (1995), *aff'd mem. sub nom. Nelson v. Director, OWCP,* No. 95-70333 (9th Cir. Nov. 13, 1996); *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 3

The Fourth Circuit applied the *Perini* holding in *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187 (1991). In *Harwood*, a harbor pilot injured while attempting to board ship brought action against the ship owner alleging causes of action under the Jones Act and general

maritime law. The District Court entered summary judgment for the ship owner on his Jones Act claim and a jury rendered a verdict for the pilot for breach of warranty of seaworthiness. After affirming the dismissal of the Jones Act claim, the Fourth Circuit reversed the verdict, finding that the pilot was covered by the Act and, thus, was not owed warranty of seaworthiness. In *Harwood*, the pilot contended that as a pilot he was not engaged in "maritime employment" as required by the 1972 amendments to LHWCA. *Id.*

Citing *Perini*, the Fourth Circuit held that seaward coverage under the Act does not depend on the nature of the worker's duties. The Court found that the 1972 amendments to the Act do not affect the pre-1972 meaning of "maritime employment" as to workers injured on navigable waters of the United States, because one injured on navigable waters in the course of his employment satisfies both the pre- and post-1972 Amendment meaning of "maritime employment." *Harwood*, 944 F.2d at 1190. The Court thus found that when the injury occurs on navigable waters, it satisfies both the "situs" and the "status" test. *Id.* Therefore, the Fourth Circuit concluded that because the pilot was injured on the navigable waters of the United States, and was not otherwise excluded from coverage under the Act, he was engaged in "maritime employment."[4] *Id.*

Employer argues in the present case that, as a bridge worker, Claimant was not engaged in maritime employment under the Act, and therefore does not meet the status jurisdiction requirement. Employer further asserts that finding status jurisdiction in the present case would violate public policy, and that the *Perini* decision is ambiguous and should be limited to the facts of that particular case. However, as discussed above, the Fourth Circuit has interpreted the *Perini* decision as holding that once it is determined that an injury has occurred upon actual navigable waters, all further inquires into the injured employee's status or occupation are unnecessary. Thus, so long as Claimant is not specifically excluded by the Act, this is the approach that shall be used in the present case. *See Harwood*, 944 F.2d at 1187.

The facts of the present case indicate that the barge on which Claimant sustained his work-related injury was located on navigable waters. Therefore, as Claimant was injured in the course of his employment on a barge afloat on actual navigable water, he was injured on navigable water. Since Claimant's alleged injury occurred in the course of his employment[5] upon navigable waters, and he is not otherwise excluded from coverage under the Act, I hold that, pursuant to *Perini*, Claimant has satisfied the situs and status elements of Sections 2(3) and 3(a), and is entitled to coverage under the Act.

Timely Notice of Injury

Employer argues that Claimant failed to provide timely section 12 notice of an injury. Employer asserts that Claimant did not give notice of his alleged May 16, 2002 injury until July

[4] The pilot also contended that he was a "master or member of a crew" and therefore specifically excluded from coverage under the Act. The Fourth Circuit noted that the test to be applied in ascertaining whether a person is "a member of a crew" for purposes of LHWCA is the same as applied in determining whether a person is a "seaman" for purposes of Jones Act jurisdiction. Applying such test, we find that the pilot in this case is not a "master or member of a crew" and is therefore covered by the LHWCA. *Harwood*, 944 F.2d at 1191.

[5] See *infra* "Causation."

18, 2002 – more than two months later. As a result of this delay, Employer alleges that it was prejudiced "from conducting a timely investigation of Claimant's alleged accident, and by preventing them from ensuring that Claimant was provided with immediate medical attention." (Employer's Brief at 13).

Section 12(a) requires that notice of a traumatic injury or death for which compensation is payable must be given within thirty days after the date of the injury or death, or within thirty days after the employee or beneficiary is aware of a relationship between the injury or death and the employment. Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, and a claimant is required in the exercise of reasonable diligence to seek a professional diagnosis only when he has reason to believe that his condition would, or might, reduce his wage-earning capacity. *Osmundsen v. Todd Pacific Shipyard*, 755 F.2d 730, 732 and 733 (9th Cir. 1985); *see* 18 BRBS 112 (1986) (*Decision and Order on Remand*); *Lindsay v. Bethlehem Steel Corporation*, 18 BRBS 20 (1986); *Cox v. Brady Hamilton Stevedore Company*, 18 BRBS 10 (1985); *Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 15 BRBS 299 (1983); *Stark v. Lockheed Shipbuilding and Construction Co.*, 5 BRBS 186 (1976). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. *Thorud v. Brady-Hamilton Stevedore Company*, 18 BRBS 232 (1986). *See also Bath Iron Works Corporation v. Galen*, 605 F.2d 583 (1st Cir. 1979); *Geisler v. Columbia Asbestos, Inc.*, 14 BRBS 794 (1981). Failure to give such notice may be excused when there is no prejudice to the employer or carrier. 33 U.S.C. §912(d)(2) (2000).

The evidence of the present case indicates that Claimant associated his back pain with the incident which arose in his employment. However, Claimant credibly testified that he initially thought he had merely pulled a muscle in his back, and would be able to "work it off." (TR. at 47). Claimant testified that he did not report his injury to his supervisors and explained, "I've had pulled muscles before and you just work them out in a couple of days and keep going." (TR. at 47). Claimant's supposition of a pulled muscle was supported during his initial visit with Dr. Anguelova, who opined that he was suffering from either a pulled muscle or arthritis, and she gave him a light duty slip to return to work with for a week. (TR. at 53).

Claimant did not learn of the extent of his injuries, and the subsequent affect on his wage earning capacity, until he consulted with Dr. Poletti on July 14, 2002. Claimant testified that his back condition continued to worsen over time, prompting him to subsequently consult Dr. Anguelova. (TR. at 55). Claimant underwent an MRI, and was referred to Dr. Poletti. (TR. at 55). Claimant testified that Dr. Poletti recommended back surgery, and it was only at this point that Claimant was taken out of work because of his injury. (TR. at 57). Clearly it was at this point that Claimant's misapprehension regarding the source of his back pain was dispelled and the possibility of an employment nexus became apparent. On July 14, 2002 Dr. Poletti concluded that Claimant "had a herniated disk at L5-S1." (CX 19). Prior to this time, Claimant had no reason to believe his condition would, or even might, reduce his wage-earning capacity as he continued to regularly work following this incident.

Further, it does not appear from the record that Claimant, in the exercise of due diligence, should have been aware of a work connection at an earlier date. To the contrary, Claimant's thought that he had merely pulled a muscle was reaffirmed by his consultation with Dr. Anguelova. Under these circumstances, Claimant clearly had no compelling reasons to suspect

that he should seek confirmation regarding the actual extreme nature of his injury at an earlier date.

Thus, Claimant first became aware that the May 16, 2002 incident, and subsequent aggravation on May 24, 2002, would be disabling when he first consulted with Dr. Poletti on July 15, 2002, and was diagnosed with a herniated disc and was taken out of work. Up until that time, Claimant assumed that he had a pulled muscle and remained unaware of the affect his injury would have on his employment. Rather, prior to this knowledge gained through his consultation with Dr. Poletti, it appears from the record that Claimant had continued to work steadily. As such, Claimant's notice, given to Employer on July 17, 2002, was timely as it was well within thirty days of July 15, 2002, the date upon which Claimant became aware of the relationship among the injury, employment and disability.

Furthermore, had it been determined that Claimant failed to timely file his notice of injury, Employer has failed to establish any prejudice it suffered as a result of the delay. Employer merely alleged that it was prejudiced by any delay because it was unable to promptly conduct an investigation into the incident, and was prevented from ensuring that Claimant received prompt medical care. Employer's concern of its inability to promptly investigate the incident is unpersuasive as prejudice. Employer must provide more than conclusory statements that it was prejudiced because of the delay. *ITO Corp. v. Director, OWCP*, 883 F.2d 422, 424 (5th Cir. 1989) (finding that employer's argument of prejudice, that it had "no opportunity to investigate the claim when it was fresh" was conclusory and not persuasive). Additionally, the record indicates that Claimant promptly sought medical attention from Dr. Anguelova, alleviating any concern of Employer that the lack of notice prevented it from ensuring that Claimant received proper medical care. As such, I find that Claimant timely provided notice of his injury. In the alternative, any delay resulted in no prejudice to Employer.

Statute of Limitations

Claimant's initial injury occurred on May 16, 2002. Employer contends that since Claimant's Form LS-203 was not filed until May 17, 2004, his claim is barred by the Act's statute of limitations.

Section 13(a) provides that the right to compensation for disability or death resulting from a traumatic injury is barred unless the claim is filed within one year after the injury or death or, if compensation has been paid without an award, within one year of the last payment of compensation. It is well-settled that the employer has the burden of establishing that the claim was not timely filed. 33 U. S. C. § 920 (b); *Fortier v. General Dynamics Corp.*, 15 BRBS 4 (1982), *appeal dismissed sub nom. Insurance Company of North America v. Benefits Review Board*, 729 F.2d 1441 (2d Cir. 1983).

The Benefits Review Board held that a worker's state compensation award, and the employer's payment of state benefits pursuant thereto, constitutes the "payment of compensation [. . .] without an award" for the purposes of §13(a) of the Act. *Reed v. Bath Iron Works*, 38 BRBS 1 (2004). The Board reasoned that an "award" can refer only to an award under the Act. *Id.* at 3. The Board found support in the fact that when §13 was originally drafted in 1927, the phrase "without an award" clearly referred to an award under the Federal Act, as payments made

pursuant to a state worker's compensation scheme led to an election of the state remedy, and federal and state remedies were exclusive. *Id.* Accordingly, the Board held in *Reed*:

> It follows that employer's payment pursuant to the state compensation award constitutes a payment without an award under the Act, and that therefore the statute of limitations was tolled until one year after employer's last payment in December 1999. As employer's liability under the Longshore Act had not been determined at the time employer made its payments to claimant under the state award, those payments are considered advance payments of compensation with regard to employer's potential liability under the Act. Therefore, they are payments without an award for purposes of §13(a).

Id. at 4-5.

In the present case, Claimant filed his South Carolina worker's compensation claim on August 21, 2002, and was awarded benefits on September 9, 2003. Employer has made, and continues to make, payments pursuant to the South Carolina state award. Thus, Claimant's claim under the Act is timely insofar as the statute of limitations was tolled by Employer's payments pursuant to the state award, which is considered "payments without an award" for the purposes of §13(a).

Collateral Estoppel

Claimant argues that Employer is collaterally estopped from contesting the fact of injury insofar as this issue was previously and necessarily decided in the South Carolina's Worker's Compensation proceeding. As Claimant highlights, Commissioner J. Alan Bass found in his decision and order that Claimant injured his low back on May 16, 2002 when he picked up the two shackles, and thereafter sustained an aggravation to his low back injury some days later. (CX 31).

Collateral estoppel precludes "the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate." *Sedlack v. Braswell Services Group*, 134 F.3d 219, 224 (4th Cir. 1998). The Fourth Circuit, the circuit in which this matter arises, requires five elements prior to the application of collateral estoppel:

> (1) The issue sought to be precluded is identical to one previously litigated;
>
> (2) The issue must have been actually determined in the prior proceeding;
>
> (3) Determination of the issue must have been a critical and necessary part of the decision in the prior proceeding;
>
> (4) The prior judgment must be final and valid;
>
> (5) The party against whom estoppel is asserted must have had a full and fair opportunity to litigate the issue in the previous form.

Sedlack, 134 F.3d at 224.

However, there are two exceptions to the doctrine that apparently do apply in this case. First, there is an exception which precludes application of the doctrine when "the forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined." Restatement (Second) Judgments § 29(2) (1982); 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4422 at 215. *See also Snider v. Consolidation Coal Co*., 973 F.2d 555, 558-60 (7th Cir. 1992); *Strachan Shipping Co. v. Shea*, 406 F.2d 521 (5th Cir. 1969).

The second exception to the collateral estoppel doctrine that applies in this proceeding is the well established principle that the doctrine is inapplicable whenever "[t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to the adversary party; or the adversary has a significantly heavier burden than in the first action" Restatement (Second) Judgments § 28(4) (1982); 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4422 at 211-14. As the Fifth Circuit held in *Strachan Shipping Co, v. Shea*, 406 F.2d 521 (5th Cir. 1969), this exception applies in cases arising under the Longshore Act because, unlike proceedings before the district courts, there is the subsection 20(a) statutory presumption that places on a defendant a burden of producing substantial evidence to rebut a presumption of causation that arises once a claimant has shown that he has suffered an injury and that working conditions could have caused that injury. *See also Freeman United Coal Mining Co. v. OWCP*, 20 F.3d 289, 294-95 (7th Cir. 1994) (holding that in a case under the Federal Black Lung Benefits Act a claimant was not estopped by a prior decision by a state workers' compensation tribunal because the state tribunal was not required to apply certain evidentiary presumptions that were required by regulations governing the Federal proceeding); *Fontenot v. AWI, Inc*., 923 F.2d 1127, 1133 n. 41 (5th Cir. 1991) (noting that the section 20 presumptions may cause a Longshore Act tribunal "to reach a result different from the one that would have been reached through a trial [before a district court.]"

Under the Longshore Act, Claimant has the benefit of the 20(a) presumption, which makes his burden of proving causation easier. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 144 (1991); *Gencarelle v. General Dynamics Corp*., 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989). Since the presumption is invoked (*See infra.)*, the burden shifts to Employer to rebut the presumption with substantial countervailing evidence which establishes that the claimant's employment did not cause, contribute to or aggravate his condition. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989); *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. *E & L Transport Co., v. N.L.R.B.*, 85 F.3d 1258 (7th Cir. 1996). In the proceedings under the South Carolina Worker's Compensation Act the burden was on Claimant, without the benefit of the presumption. South Carolina Code §42-9-80 (2005). As Employer's burden is heavier in this instance under the Act, and it is against the Employer whom preclusion is sought, collateral estoppel does not apply.

Section 20(a) Presumption

Employer next argues that Claimant's employment did not cause or aggravate his back injury. Section 20(a) of the Act, 33 U.S.C. 920(a), creates a presumption that a claimant's disabling condition is causally related to his employment. In order to invoke the section 20(a)

presumption, a claimant must prove that he suffered a harm and that conditions existed at work or an accident occurred at work that could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards, Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the § 20(a) presumption. *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom, Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS (5th Cir. 1982).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Once this *prima facie* case is established, a presumption is created under §20(a) that the employee's injury arose out of employment.

In determining whether the section 20(a) presumption has been invoked, the first issue is whether a harm exists. In the present case, it is clear that Claimant suffers from a physical harm. Upon his examination and review of medical records, Dr. Poletti concluded that Claimant "had a herniated disk at L5-S1," for which Claimant has undergone several surgeries, and has received continuous medical care. (CX 35-10, 11).

In order to enjoy the benefit of the §20(a) presumption, Claimant must also establish that an accident occurred or working conditions existed that could have caused this physical harm. In this respect, Claimant argues that he has offered sufficient evidence establishing that an accident occurred at work that could have caused this injury. Claimant testified that he injured his back while "toting shackles" from one barge to another on May 16, 2002. Claimant's testimony is supported by that of his co-worker, Allen Casey, who testified that Claimant told him about the incident on their ride home together that evening. (TR. at 116). Additionally, Claimant's wife testified that upon his return home from work on May 16, she noticed that he was "walking kind of funny" and that Claimant had told her that his back pain occurred after he jumped down onto a barge while toting shackles. (TR at 115, 126). Claimant also credibly testified that he endured a second work-related incident that aggravated his back injury on May 24, 2002. (TR. at 85). Claimant explained, "I aggravated my back when I jumped back down off the crane tracks onto the barge. I went to my knees when my feet hit, I just jarred my back and intensified everything that was done messed up." (TR. at 85).

In response, Employer argues that Claimant failed to establish that an accident occurred at work that could have caused him harm. Employer specifically argues that the May 16, 2002 and May 24, 2002, incidents never occurred, evidenced by the fact Claimant neglected to immediately report his injury. Also in support of this proposition, Employer notes that Claimant initially informed Dr. Anguelova that he hurt his back "either at work or at home." (TR. at 52, 93). Additionally, Employer has presented evidence that when he informed his supervisor, Lewis Collier, that he required light duty, he failed to inform him that his injuries occurred at work. (TR. at 74-5). Employer cites additional evidence that the May 24, 2002 incident never occurred, in the fact that Claimant completed and signed a Foreman's Daily Labor Report on that date without indicating that he had sustained an injury during the course of his employment. (EX 1).

Furthermore, Employer argues that Claimant's description of events was unsubstantiated. No witnesses have corroborated Claimant's contention that his alleged aggravation of his back injury in the course of his employment on May 24 required him to radio for transport by boat from the barge to land before his shift ended. Employer asserts that the lack of entry recording this alleged event supports a finding that the May 24 incident never occurred. (EX 3).

Upon consideration, I find that Claimant has established by a preponderance of the evidence that an accident occurred at work that could have caused his back injury. From the outset, I find Claimant's recollection of the events to be credible. Though Employer's concern of the lack of substantiation of Claimant's testimony is valid, there appears to be good reason for it. Claimant's testimony that he neglected to report his injury because he assumed that he had merely pulled his back and could work through the pain, and that he did not want to negatively affect his employment by reporting his pain is feasible. Similarly, he explained his hesitation in reporting the cause of his pain to Dr. Anguelova because he wanted to "cover his job," in case Employer saw a copy of his medical record. Mr. Casey's testimony supports the notion that Employer's employees feel compelled to protect their employment. Mr. Casey acknowledged that it is not typical for employees to report back pain to their supervisors:

> Not on any construction site. I've worked dredge boats twelve years, build bridges, built steel mills. You work it out if you can. Save your job.

(TR. at 117). Mr. Casey agreed that "[i]f someone were to go and report to a safety person or a supervisor every time they had discomfort in their back, [it] would [. . .] reflect poorly on their job security[.]" (TR. at 117). It is notable that Claimant informed both his wife, and Mr. Casey that he had injured himself at work. (TR. at 116, 134). As such, I find that Claimant has sufficiently shown that a work accident occurred that could have caused his pain.

Thus, upon consideration of the evidence, I find that Claimant has established a *prima facie* case for compensation and is entitled to the presumption of §20(a) that his work accident caused his herniated disk. Therefore, the burden of proof then shifts to Employer to rebut the presumption with substantial countervailing evidence.

Rebuttal of Section 20(a) Presumption

Since the presumption has been invoked, the burden now shifts to the employer to rebut the presumption with substantial countervailing evidence that establishes that the claimant's employment did not cause, aggravate, or accelerate his condition. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976); *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991); *James v. Pate Stevedoring Co.*, 22 BRBS 271, 273 (1989). Substantial evidence is relevant evidence such that a reasonable mind might accept it as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951); *Consol. Edison Co. v. Labor Bd.*, 305 U.S. 197, 229 (1938).

The employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). *Dearing v. Director, OWCP*, 998 F.2d 1008, at *2, 27 BRBS 72, 75 (4th Cir. 1993) (unpublished) (per curiam); *Steele v. Adler*, 269 F. Supp. 376, 379

(D.D.C. 1967); *Smith v. Sealand Terminal, Inc.*, 14 BRBS 844, 846 (1982). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and the employment. *See Am. Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 817-19 (7th Cir. 1999); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990).

The employer may also rebut the presumption with negative evidence, but again, negative evidence must be "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Swinton*, 554 F.2d at 1083. An employer cannot rebut the presumption on the basis of suppositions or equivocal testimony. *Dewberry v. S. Stevedoring Corp.*, 7 BRBS 322, 325 (1977), *aff'd mem.*, 590 F.2d 331 (4th Cir. 1978). Rather, an employer must show either facts or negative evidence that is both specific and comprehensive to overcome the presumption. If the employer presents specific and comprehensive evidence sufficient to sever the connection between a claimant's harm and his employment, the presumption no longer controls, and the issue of causation must resolved on the whole body of proof. *See Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935); *Volpe v. Northeast Marine Terminals, Inc.*, 671 F.2d 697, 700 (2d Cir. 1981); *Leone v. Sealand Terminal Corp.*, 19 BRBS 100, 102 (1986).

In rebuttal, Employer argues that the record contains sufficient evidence that Claimant's back injuries were pre-existing. In support, Employer offers Mr. Collier's deposition testimony that recalled Claimant informed him that, "I've got to have my back checked like once a year" and that "[t] his is something that happened a long time ago." (EX 22). Additionally, there is evidence in the record that Claimant informed Dr. Anguelova that his back had previously pained him. However, the Employer has not offered any physician's opinion that the Claimant's herniated disk is not related to the May 16 and May 24, 2002 work accidents. Instead, Employer argues that Claimant suffered from pre-existing back problems. Even if that argument is accepted, it is not sufficient to sever the presumed connection between his herniated disk and the May 16 and May 24, 2002 work accidents.

Based upon the evidence submitted by Employer, I find that Employer has not met its burden of rebutting the §20(a) presumption. The evidence offered by Employer does not rise to the level of specificity and comprehensiveness necessary to rebut the presumption. Employer's supposition that Claimant's disk herniation was pre-existing is unsupported by specific medical opinion or evidence, and is thus unpersuasive. Therefore, I find that the §20(a) presumption is not rebutted and that Claimant's injury is compensable under the Act.

Nature and Extent of Disability

The burden of proving the nature and extent of disability rests with Claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and

(his)(her) inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss or a partial loss of wage earning capacity.

Nature

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. *See Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235, fn. 5 (1985); *Trask v. Lockheed Shipbuilding Construction Co.,* 17 BRBS 56, 60 (1985); *Stevens v. Lockheed Shipbuilding Company*, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record and is not dependant on economic factors. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). Where the medical evidence indicates that the claimant's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for a judge to find that maximum medical improvement has been reached. *Dixon v. Cooper Stevedoring Co.*, 18 BRBS 25, 32 (1986). However, the mere possibility of surgery, by itself, does not preclude a finding that claimant's condition is permanent. *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 202 (1986).

Dr. Poletti opined that Claimant reached maximum medical improvement on October 14, 2004. (CX 35-28). There is no medical evidence to the contrary. As such, I find that Claimant has been permanently disabled since this date.

Extent

The question of extent of disability is an economic as well as a medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corporation*, 25 BRBS 128, 131 (1991). To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). A claimant's credible testimony alone, without objective medical evidence, on the issue of the existence of disability may constitute a sufficient basis for an award of compensation. *Ruiz v. Universal Maritime Service Corp.*, 8 BRBS 451, 454 (1978); *Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). In addition, claimant's credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award of compensation notwithstanding considerable evidence that claimant can perform certain types of work activity. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78, (5th Cir. 1991). When the facts support a finding in favor of either party, the choice between reasonable inferences is left to the administrative law judge and may not be disturbed if it is supported by the evidence. *Id.* at 945, 81.

Employer does not contest the finding that Claimant is unable to return to his usual employment. (Employer's Brief at 31). Additionally, the evidence also supports this finding, as Claimant's testimony of pain, and his medical restrictions are incompatible with his former

employment. Even Employer's vocational expert, Pamela Hill White, agrees that Claimant cannot return to his previous employment as a heavy lift foreman. (TR. at 179). Thus, I find that Claimant has made a *prima facie* case of total disability.

As Claimant has established a *prima facie* case of total disability, and the burden shifts to the employer to establish the availability of suitable alternate employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). To do so, the employer must show the existence of realistic job opportunities which the claimant is capable of performing, considering his age, education, work experience, and physical restrictions. *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If the employer satisfies its burden, then the claimant, at most, may be partially disabled. *See, e.g., Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). However, the claimant can rebut the employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Newport News Shipbuilding & Dry Dock Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

One way in which an employer can meet its burden of showing suitable alternate employment is through vocational evidence which establishes the existence of specific and actual employment opportunities available to the injured employee. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

Employer asserts that it has met this burden by proving that Claimant is capable of obtaining gainful employment in the Charleston or Myrtle Beach metropolitan areas within his physical capabilities, as evidenced by the labor market survey and testimony of Ms. White.

Overall, I find that the labor market survey fails to support the conclusion that the jobs identified were available during the period of claimed disability, as the survey merely lists general positions, but fails to include specific employers. Ms. White's labor market survey and addendum failed to provide the names, addresses or telephone numbers of the prospective employers she claims are offering alternative employment acceptable for Claimant.[6] As such, this report fails to identify actual jobs Claimant could perform, but instead listed several categories without providing any specific names of prospective employers. Because the specific jobs are not mentioned, it is impossible to decipher whether these are actual, or merely theoretical, opportunities.

[6] Several of the listed positions stated that the potential employer is "South Carolina Employment Security Commission." However, official notice is taken that the commission is a government agency which offers resources to locate employment, but does not provide such employment. (See http://www.sces.org/Jobs/index.htm.) As such, I find that these listed positions containing this employer remain insufficient to establish suitable alternate employment.

Arguably, the two positions listing contact persons are more specific than the other listings. Additionally, the Gate Guard position lists Middletown Place and SC County Parks and Recreation as the specific potential employers, and the Visual Quality Inspector listing identifies several positions with Hammes Staffing and Gallmen Personnel. Finally, the Parking Lot Attendant/Cashier position identified Charleston Airport as the potential employer. However, all of these positions are located in either the Myrtle Beach or Charleston, South Carolina areas, and are thus insufficient because they are not located within Claimant's geographical area. It has long been established that the employer must show jobs that are available within the claimant's "local community." *New Orleans (Gulfwide)Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981); *Holder v. Texas Eastern Products Pipeline Inc.*, 35 BRBS 23 (2001). Claimant resides in Andrews, South Carolina. Virtually all of the positions listed in the labor market survey exist in either Charleston, South Carolina or Myrtle Beach, South Carolina, both of which are located approximately 1.5 hours of driving away from Andrews. Employer asserts that Claimant is capable of driving this distance to the relevant job markets. In support, Employer notes that Claimant drove to the hearing, more than an hour in length. Additionally Claimant hurts for hours at a time, sat through a two hour vocational interview, and has been assigned no restrictions on driving.

Notably, however, Claimant's treating physician, Dr. Poletti, testified that he would not recommend that Claimant undertake employment which required him to drive 1.5 hours each way. Additionally, both Claimant and his wife noted that driving to Charleston for a doctor's appointment puts him "out of commission" for the rest of the day, and oftentimes, for the following days. (TR. at 73, 135). Finally, Ms. White herself noted that "if [Claimant's] not able to drive that long, then that wouldn't be a possibility." (TR. at 205). This evidence suggests that Claimant's physical problems and pain would prevent him from making the regular 1.5 hour commute each way that would be necessary to maintain employment in Charleston or Myrtle Beach. Therefore, I find that the positions available in Myrtle Beach and in Charleston do not constitute suitable alternate employment.[7]

As Employer has offered no other relevant evidence of suitable alternate employment, I find Claimant to be totally disabled as of July 13, 2002, the date upon which he was removed from work by his treating orthopedic surgeon, Dr. Poletti.[8]

Section 14(e) Penalty

Claimant asserts that since Employer did not file a notice of controversion within the required fourteen days after Employer had knowledge of the alleged injury, Employer is liable for the 10% assessment on unpaid installments through the filing of the notice of controversion. §14(e) of the Act provides for additional compensation under certain circumstances when payment of benefits is withheld by the Employer:

[7] The Labor Market Survey also contains a listing for an Electronic Assembler position available through Hammes Staffing. However, there is no indication of where this position is located, and it is thus impossible to tell if it is available within Claimant's local area. As such, this position is insufficient to qualify as suitable alternate employment.

[8] There is no evidence in the record that Claimant suffered a loss of wage earning capacity as a result of his work related injuries prior to this date, as it appears that Claimant continued to regularly work following his injuries.

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due [. . .] there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. § 914(e). The purpose of §14(e) is to encourage the prompt payment of benefits, to ensure that claimants receive the full amount due, and to act as an incentive to induce employers to bear the burden of bringing any compensation disputes to the Department of Labor's attention. *See Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989); *aff'd in part. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990). In order to escape §14(e) liability, the employer must pay compensation, controvert liability, or show irreparable injury. *See Frisco v. Perini Corp., Marine Div.*, 14 BRBS 798, 800 (1981).

The Benefits Review Board has held that an employer's liability under §14(e) is not excused because the employer believed that the claim came under a state compensation act. *Jones v. Newport News Shipbuilding and Dry Dock Co.,* 5 BRBS 323 (1977), *aff'd sub nom. Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167 (4th Cir. 1978), *cert. denied*, 439 U.S. 979 (1978).

It is well-settled that the §14(e) additional assessment is mandatory and may not be waived by Claimant. *Tezeno v. Consolidated Aluminum*, 13 BRBS 778 (1981); *McNeil v. Prolerized New England Co*., 11 BRBS 576 (1979); *Harris v. Marine Terminals Corp*., 8 BRBS 712 (1978); *Nulty v. Halter Marine Fabricators, Inc*., 1 BRBS 437 (1975). It is also well-settled that compensation becomes due fourteen (14) days after the employer has knowledge of its employee's injury or death, and not until such time as the claim is filed. *Pilkington v. Sun Shipbuilding & Dry Dock Company*, 9 BRBS 473 (1978).

There is ample evidence in the record that Employer received notice of Claimant's injury on July 17, 2002. Employer did not file a form LS-207 until May 27, 2004. Though Employer paid benefits under the state workers' compensation scheme, such payments do not excuse Employer's liability under the Act.[9] Though Employer paid benefits under the state workers' compensation scheme, such payments do not excuse Employer's liability under the Act. Because Employer did not controvert its liability within fourteen days of having knowledge of Claimant's injury and did not pay compensation voluntarily, Claimant is entitled to a §14(e) assessment. Accordingly, Employer owes Claimant an additional 10% penalty on all payments due beginning with the July 17, 2002 awareness of Claimant's injury until May 27, 2004, when Employer filed its Notice of Controversion, limited to the difference, if any, between the amount awarded under the state act and the greater amount awarded under the Act.

[9] However, because this case involves payments made under a state act, the §14(e) assessment is limited to the difference, if any, between the amount awarded under the state act and the greater amount awarded under the Longshore Act. *See, e.g., Dygert v. Manufacturer's Packaging Co*., 10 BRBS 1036 , 1046 (1979).

Section 8(f) Relief

Employer argues that, to the extent Claimant is entitled to benefits under the Act, it is entitled to a limitation of liability in accordance with the provisions of 33 U.S.C. §908(f) of the Act. Under §8(f) of the Act and its implementing regulations contained at 20 C.F.R. §702.321, there are four prerequisites for employer eligibility for special fund relief: (1) the claimant must suffer from a pre-existing permanent partial disability; (2) the pre-existing condition must have been "manifest" to the employer; (3) the claimant must have suffered a new injury or aggravation of the pre-existing condition; and (4) the claimant's disability must not be the sole result of the new injury. *See* 33 U.S.C. § 908(f); *Lawson v. Suvanee Fruit and Steamship Co.*, 336 U.S. 198 (1949); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990), *rev'g* 16 BRBS 231 (1984), 22 BRBS 280 (1989); *Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 1316-17 (11th Cir. 1988) (en banc), *aff'g Stokes v. Jacksonville Shipyards*, 18 BRBS 237 (1986); *FMC Corporation v. Director, OWCP*, 886 F. 2d 118 (9th Cir. 1989); *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616 (9th Cir. 1983); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110 (4th Cir. 1982); *Director, OWCP v. Sun Shipbuilding & Dry Dock Co.*, 600 F.2d 440 (3rd Cir. 1979); *C & P Telephone v. Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977); *Equitable Equipment Co. v. Hardy*, 558 F.2d 1192 (5th Cir. 1977); *Shaw v. Todd Pacific Shipyards*, 23 BRBS 96 (1989); *Dugan v. Todd Shipyards*, 22 BRBS 42 (1989); *McDuffie v. Eller and Co.*, 10 BRBS 685 (1979); *Reed v. Lockheed Shipbuilding & Construction Co.*, 8 BRBS 399 (1978); *Nobles v. Children's Hospital*, 8 BRBS 13 (1978). The purpose of section 8(f) is to prevent employer discrimination in hiring and firing of handicapped workers. *Director v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982).

An application for relief under section 8(f) of the Act must be submitted and documented at the earliest possible opportunity. 20 C.F.R. § 702.321*; Universal Maritime Corp. v. Moore,* 126 F.3d. 256, 267-68 (4th Cir. 1997*).* The purpose of requiring an application for section 8(f) relief to be filed at the earliest possible occasion is to provide the district director with a full and fair opportunity to evaluate claims at the outset, and then permit the Director to defend the Special Fund before the Office of Administrative Law Judges. *Director, OWCP, v. Newport News Shipbuilding and Dry Dock Co. (Elliot),* 134 F.3d 1241, 1245 (4th Cir. 1998).

Absolute Defense

Counsel for the Director has raised in his brief the issue of application of the absolute defense of § 8(f)(3) of the Act. Section 8(f)(3) of the Act provides in pertinent part:

> Any request [. . .] for apportionment of liability to the special fund established under section 44 of this Act [. . .] for the payment of compensation benefits, and a statement of the grounds therefore, shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the Special Fund's liability for the payment of any such benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

33 U.S.C. § 908(f)(3).

Regulations implementing this statute give extensive directions for the filing of an application with the district director during the informal portion of the claim process. *See* 20 C.F.R. § 702.321(b)(1) &(2); *see generally* 33 U.S.C. § 919 (explaining claim procedure); 20 C.F.R. § § 702.301-702.319. The regulations implementing §908(f) provide a specific time frame for when to file an application "prior to the consideration of the claim by the [director]." An application "should be made as soon as the permanency of the claimant's condition becomes known or is an issue in dispute." 20 C.F.R. § 702.321(b)(1).

When the claim cannot be resolved without a formal hearing and is referred to the Office of Administrative Law Judges ("OALJ") for a hearing, the regulation provides with regard to an application for special fund relief:

> Where the claimant's condition has not reached maximum medical improvement and no claim for permanency is raised by the date the case is referred to the OALJ, an application need not be submitted to the district director to preserve the employer's right to later seek relief under section 8(f) of the Act. In all other cases, failure to submit a fully documented application by the date established by the district director shall be an absolute defense to the liability of the special fund. This defense is an affirmative defense which must be raised and pleaded by the Director. The absolute defense will not be raised where permanency was not an issue before the district director. In all other cases, where permanency has been raised, the failure of an employer to submit a timely and fully documented application for section 8(f) relief shall not prevent the district director, at his/her discretion, from considering the claim for compensation and transmitting the case for formal hearing. The failure of an employer to present a timely and fully documented application for section 8(f) relief may be excused only where the employer could not have reasonably anticipated the liability of the special fund prior to the consideration of the claim by the district director.

20 C.F.R. § 702.321(b)(3).

Employer argues that the absolute defense is not applicable in the present case because permanency was not in issue during the September 29, 2004, informal conference with Claims Examiner Kristina K. Hall[10]. Additionally, Employer was not voluntarily paying permanent

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[10] In support of this argument, Employer highlights a Notice of Telephone Conference which delineates the issue for the informal conference as "Jurisdiction" under the Act. Contrary to Employer's argument however, it appears that permanency was an issue during the September 29, 2004 informal conference. The Memorandum of Informal Conference recorded that:

> Claimant was working from a barge in a bridge building project, and intends to pursue the claim under the Longshore and Harbor Workers' Compensation Act. Claimant contends he meets the situs requirement and seeks the higher benefits afforded under the Act. [Claimant] has had three surgeries and is permanently and totally disabled. Penalties are claim on the differential in benefits.

(CX C). Employer's position, in part, was recorded as, "Claimant is still treating and has not been released according to the carrier's records, so the claim for permanent total disability is premature." (CX C). The results of the Informal Conference state, "[C]laimant will follow up with the treating physician to obtain his opinion on [Claimant's] date of maximum medical improvement and extent of disability." (CX C). While this evidence begs

disability benefits prior to the referral of the matter to the OALJ. Thus, Employer argues that because permanency was not an issue before the District Director, Employer was not required to submit a fully documented application for §8(f) relief prior to the referral of the case to the OALJ, and as a result, the District Director may not invoke the absolute defense under the Act.

However, there is sufficient evidence in the case that permanency was an issue prior to the referral of this case to the OALJ. In addition to the evidence discussed in FN 6 (*see Infra.*), other evidence is available in the record that highlights the issue of permanency prior to the referral of the claim to the OALJ. Specifically, on Employee's Claim for Compensation, dated March 18, 2004, Claimant checked "Yes" in answering the question "Has injury resulted in permanent disability, amputation or serious disfigurement?" Dr. Poletti declared Claimant to be permanently disabled as of October 14, 2004. Notably Claimant's pre-hearing statement dated December 20, 2004, listed both "permanent total disability" and "Permanent partial disability" as issues being presented for resolution at the formal hearing. These events occurred prior to the referral of this claim to the OALJ on February 17, 2005. Thus, the issue of permanency was clearly raised by the Claimant prior to referral of the claim for hearing, at least as early as March 18, 2004.

Nevertheless, Employer did not file its 8(f) application until June 8, 2005. Employer has offered no other evidence regarding its failure to present a timely and fully documented application for section 8(f) relief. Nor has evidence been presented to establish that it should be excused because it could not have reasonably anticipated the liability of the special fund prior to the consideration of the claim by the district director. Therefore, I find that Employer's entitlement to §8(f) relief is barred pursuant to §8(f)(3).

In the alternative, even if not barred by the absolute defense of §8(f)(3), Employer should not be granted §8(f) relief based on the merits of the claim.

In order for the Employer to obtain relief from the special fund, Claimant must have had an existing permanent partial disability at the time of the injury in question. Rather, this first requirement is satisfied if it is shown that:

> [T]he employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability.

Lockheed Shipbuilding, 25 BRBS at 87(CRT) (citing *C & P Telephone Co.*, 564. F.2d at 513).

This element has arguably been met in the present case. Dr. Poletti checked 'Yes" on a medical questionnaire dated October 15, 2003, in answering the question "Did [Claimant] have degenerative changes to the back that were aggravated by his alleged injury prior to the accident

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the assumption that permanency was at issue during the informal conference, it is not sufficiently clear as to whether permanency was actually considered by the deputy commissioner to allow the serious consequences occasioned by barring employer's request for §8(f) relief based on this evidence alone. Further, as this is a *de novo* hearing, the findings of the District Director in an informal conference are generally admissible only to document that a conference occurred. It is unclear whether the identification of issues discussed in the conference are admissible to document that permanency was an issue below. In any event, the result is the same, for the reasons discussed below.

of May 16, 2002." (EX 6). Giving Employer the benefit of the doubt, the pre-existing injury element for section 8(f) relief has been met in the present case.

However, Employer has failed to establish the manifestation element. Only those pre-existing conditions that are manifest to an employer at the time of injury of the employee will satisfy section 8(f). *Lambert's Point Docks v. Harris*, 718 F.2d 644 (4th Cir. 1983). Actual knowledge is not required. The mere existence or availability of records showing the impairment in question is sufficient notice to meet the manifestation requirement. *Lowry v. Williamette Iron and Steel Co.*, 11 BRBS 372 , 375 (1979).

This element has not been met in the present case. Employer argues that Dr. Anguelova's records following Claimant's initial work injury on May 16, 2002 document Claimant's prior back injuries and were thus manifest to Employer prior to his May 24, 2002 work injury. However, the manifestation requirement is not met where the pre-existing impairment is diagnosed or discovered at the time of or after occurrence of the injury which prompted filing of the claim, *Harris v. Lambert's Point Docks, Inc.,* 15 BRBS 33 , 36 (1982), *aff'd Lambert's Point Docks v. Harris*, 718 F.2d 644, 648 (4th Cir. 1983); *Hitt v. Newport News Shipbuilding and Dry Dock Company*, 16 BRBS 353 , 356 (1984); *Sweitzer v. Lockheed Shipbuilding and Construction Company*, 8 BRBS 257 , 263 (1978). As Claimant's May 16, 2002 injury prompted, in part, the filing of this claim, and there is no additional evidence that Employer was aware of any previous back injuries prior to this, I find that the manifestation requirement has not been met.

Section 8(f) is not applicable unless the pre-existing impairment contributes to Claimant's overall degree of permanent partial or total disability so that it is greater than that which the subsequent injury alone would cause. *Pecoriello v. Caddell Dry Dock Co.*, 12 BRBS 84 (1980). The record does not contain sufficient evidence that Claimant's pre-existing injuries contributed to his ultimate disability. Employer again cites in support the medical questionnaire dated October 15, 2003, in which Dr. Politti checked "Yes" next to the following questions:

> Did the alleged injury to his back on May 16, 2002 aggravate or combine with the pre-existing degenerative changes to his back?
>
> Did the fact that [Claimant] had degenerative changes in his back, aggravated by the alleged injury to his back cause him to lose substantially more time from work past, present and future than he would have had from the alleged May 16, 2002 injury alone?
>
> Did the fact that [Claimant] had degenerative changes in his back, aggravated by the alleged injury to his back cause him to have a substantially higher percentage of permanent disability than he would have had from the alleged May 16, 2002 injury alone?
>
> Have the medical costs in this case been substantially increased or with reasonable certainty going to increase due to the existence of degenerative changes to his back, aggravated by the alleged injury to his back[?]

(EX 6).

In assessing whether the contribution element has been met, an ALJ may not "merely credulously accept the assertion of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." *Carmines*, 138 F.3d at 140. Recent cases in the Fourth Circuit have stressed that doctors' opinions will not be sufficient if "they are conclusory and lack[ing] in evidentiary support." *Newport News Shipbuilding & Dry Dock Company v. Ward*, 326 F.3d 434, 442 (4th Cir. 2003); *see also Newport News Shipbuilding & Dry Dock Company v. Cherry*, 326 F.3d 449, 453 (4th Cir. 2003) (rejecting similar evidence as "pure conjecture.") As there is no other evidence of Claimant's pre-existing injury contributing to his ultimate permanent total disability other than a mere check mark "Yes" to general questions, I find that the contribution element has not been met.

In sum, I find that Claimant's section 8(f) application is barred by §8(f)(3) because it was not timely filed. In the alternative, I find that Employer is not entitled to §8(f) relief because, though Claimant may arguably have suffered from a pre-existing injury, I find that such injury was not manifest to Employer and did not contribute to Claimant's ultimate permanent total disability. Therefore, Employer's request for section 8(f) relief is denied.

ORDER

Accordingly, it is hereby ordered that:

1. Employer, Palmetto Bridge Constructors and Carrier, St. Paul Fire & Marine Insurance Co., are hereby ordered to pay to Claimant, David M. Inman, temporary total disability benefits for the period of July 13, 2002, through October 14, 2004, inclusive, at the compensation rate of $645.88 per week;

2. Employer/Carrier are hereby ordered to pay to Claimant permanent total disability benefits for the period of October 15, 2004 through the present and continuing, inclusive, at the compensation rate of $645.88 per week;

3. Employer/Carrier shall be liable for an assessment under §14(e) of the Act on all payments due beginning July 17, 2002 awareness of Claimant's injury until May 27, 2004, equal to ten per cent of the difference between the installments due under the Act and those paid under the State Act.

4. Employer/Carrier is hereby ordered to pay all medical expenses related to Claimant's work related injuries;

5. Employer's request for §8(f) relief is denied;

6. Employer/Carrier shall receive credit for any compensation already paid;

7. Interest at the rate specified in 28 U.S.C.§1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued

benefits and penalties, computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984); and

8. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

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RICHARD E. HUDDLESTON
Administrative Law Judge